United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7161

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7161

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

JOINT APPENDIX

VOLUME IV

§ 5 Trial Memoranda of the Parties
§ 6 Post-Trial Developments

UNITED STATES COURT OF APPEALS
FILED
MAY 18 1976
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SECOND CIRCUIT

(Counsel Listed on Inside Page)

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ALFRED S. JULIEN
STUART A. SCHLESINGER
DAVID JAROSLAWICZ
JULIEN & SCHLESINGER
Two Lafayette Street
New York, New York 10007.
(212) 962-8020

DAVID L. WASSER
250 West 57th Street
New York, New York 10019.
(212) CI 6-3880

Attorneys for Plaintiff-Appellee-Cross-Appellant

ROBERT MACCRATE
WILLIAM M. DALLAS, JR.
SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005.
(212) 952-8100

STANLEY D. ROBINSON
MICHAEL MALINA
KAY, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022.
(212) 759-8400

WILLIAM A. ZOLBERT
Office of the General Counsel
Ford Motor Company
Dearborn, Michigan 48121.
(313) 594-0604

Attorneys for Defendants-Appellants-Cross-Appellees

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Plaintiff's During Trial Memorandum,
September 25, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

- - - - - - - - - - - - - - - - - - - x

73 Civ. 713 (HFG)

PLAINTIFF'S DURING TRIAL MEMORANDUM

Received in Court
2:50 P.M.
September 25,
1974
David Burton Carroll

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
FILM COLLISION PARTS, INC.,

73 Civ. 713 (TPG)

Plaintiff,

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.
- x

PLAINTIFF'S TRIAL MEMORANDUM

POINT I

DEFENDANTS' HAVING VIOLATED THE ANTITRUST LAW OF THE UNITED STATES, PLAINTIFF IS ENTITLED TO RECOVER THREE TIMES THE AMOUNT OF DAMAGES IT HAS SUSTAINED BY REASON OF DEFENDANTS' ILLEGAL ACTS AND IN ADDITION PLAINTIFF IS ENTITLED TO RECOVER A REASONABLE ATTORNEYS' FEE AND THE COSTS OF THIS ACTION

The plaintiff in this action has suffered various damages by reason of defendants' violations of the antitrust laws. Each type of damage suffered by the plaintiff in this case has been said, by the courts to be recoverable from the defendant.

The plaintiff in this case has suffered damages in that its costs of business actually transacted have been increased due to defendants' violations of the antitrust laws and plaintiff is

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entitled to recover for the amount of that increased cost. See: Thomsen v. Kayser, 243 US 66 (1917); Straus v. Victor Talking Mach. Co., 297 F.791, 803 (2d Cir.,1924); Flintkote v. Lysfjord, 246 F2d 368, 389-390 (9th Cir) cert denied 355 U.S. 835 (1957).

As of November 1, 1972, the defendants have refused to permit any franchised Ford dealer to receive the wholesale incentive allowance for sales which such dealers have made to plaintiff (see pretrial order, Par. 26).

From November 1, 1972 to September 20, 1974, plaintiff has purchased $1,139,232 worth of Ford crash parts from franchised Ford dealers. Due to defendants' violations of the antitrust laws, plaintiff has overpaid by 16% of that amount or $182,277. See item 1(a) of Exhibit A attached. (although the wholesale incentive allowance is 25%, the wholesale incentive allowance is not permitted for all parts. It is only granted for certain parts. A review of plaintiff's books and records has indicated that the wholesale incentive amounted to 16% of plaintiff's total purchases.)*

* All of the figures with regard to plaintiff's damages have been verified by David L. Wasser, Certified Public Accountant, through computations made of plaintiff's books and records. The cases have held that such evidence provided by a certified public accountant which he has obtained from plaintiff's books and records is competent to show damages. See: Conn.Importing Co. v. Frankfort Distilleries, 101 F2d 79 (2d Cir 1939 citing Wm. H. Rankin Co. v. Assoc. Bill Posters of U.S. and Canada, 42 F2d 152 (2d Cir 1930).

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Plaintiff has likewise been damaged by having been forced to incur additional costs as a result of defendants depriving it of its portion of parts obsolescence credits (see pretrial stipulation, Par. 16) which it had been receiving prior to the defendants' interference with plaintiff's receipt of such a credit.

The amount of such obsolescence credits from November 1, 1972 to September 20, 1974 is $48,615 (see Exhibit A, item 1(b).

Defendants have also prevented plaintiff from receiving the stock order discounts it had received prior to the defendants' interference. The amount of these for the period November 1, 1972 through September 20, 1974 is $21,945 (see Exhibit A, item 1(c). (attached)

Defendants have also caused plaintiff to lose the stock order discount when it revoked the separate code number plaintiff had acquired under an arrangement with Central Lincoln-Mercury. Plaintiff's damages for that loss from January 1, 1971 through November 1, 1972 likewise equalled approximately $21,945 (see Exhibit A, item 2).

Subsequent to November 1, 1972 when defendants caused Atlas Lincoln-Mercury to stop dealing with plaintiff, it was compelled to pay an additional 2% on all Ford crash parts which it purchased from franchised Ford dealers. That 2% by which plaintiff was damaged amounts to $20,900 (see Exhibit A, item 1(d)).

Defendants, by monopolizing the sale of Ford crash parts and preventing the plaintiff from purchasing crash parts directly from the defendants, have compelled plaintiff to pay a premium to franchised Ford dealers in order to obtain Ford crash parts through its franchise dealers for the period September 30, 1965 through September 20, 1974 which has caused the plaintiff to be damaged in the amount of $103,456 (see Exhibit A, item 3).

Plaintiff is also entitled to recover for the profits which it lost due to the defendants' violations of the antitrust laws (see Bigelow v. RKO Radio Pictures, Inc., 327 US 251 (1946; Eastman Kodak Co. v. So. Photo Co., 273 US 359 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 US 555 (1931).

Plaintiff since it commenced business in 1965 up to 1973 had steadily extended its volume of business from $245,739 in 1966 to $798,947 in 1973. Defendants' violations of the antitrust laws have made it unprofitable for plaintiff's business to expand as it had in the past. Assuming that plaintiff's growth rate had been maintained at the same rate as in the past, plaintiff would have had additional sales of approximately $336,487 from 9/30/73 to 9/30/74 and at a profit margin which it maintained, it would have realized an additional $88,986 in profits which they have been deprived of due to defendants' actions (see Exhibit A, addendum).

Plaintiff is also entitled to recover any decrease in the value of its investment or any tangible property which has been brought about by defendants' violations of the antitrust laws (see Story Parchment Co. v. Paterson Parchment supra at 566-567).

Defendants' violations of the antitrust laws have caused the value and goodwill of plaintiff's enterprise as an ongoing business to be diminished and plaintiff's business is now in a position where it cannot be sold and no buyer exists for it. By reason thereof, plaintiff has been damaged in the amount of $87,115 (see Exhibit A, item 1(e).

Plaintiff is entitled to recover for each of the above ways in which it has been damaged by reason of defendants' violations of the antitrust laws. Each manner in which plaintiff has suffered damage is separate and distinct and the plaintiff may recover for all three types of damage i.e. (a) increased cost of doing business (b) loss of profits which could have been earned by plaintiff in a freely competitive market and (c) the decrease in the tangible value and salability of plaintiff's business.

The fact that some of plaintiff's damages e.g. loss of goodwill and the value of plaintiff's business cannot be calculated with absolute exactness will not render them so

[redacted] v. Comex Corp., 272 F2d 1 (7th Cir 1959) cert denied 362 US 962 (1960).

uncertain so as to preclude as assessment of damages. If a reasonable basis of computation is afforded, that is sufficient although only an approximate result can be obtained (see Eastman Kodak Co. v. So. Photo Materials Co., 295 Fed 98, affd 273 US 359).

The defendant whose wrongful conduct has rendered difficult the ascertainment of the precise amount of damages is not entitled to complain that plaintiff's damages cannot be measured with exactitude. All that the law requires is that the damages be reflected and shown with a reasonable basis and a reasonable degree of accuracy (see Bigelow v. RKO Radio Pictures, 327 US 251)

15 U.S.C. 15 also specifically permits the plaintiff who has been injured by reason of defendant's violation of the antitrust laws to recover a reasonable attorneys' fee and the costs of the action.

Plaintiff is, therefore, entitled to recover reasonable attorneys' fees and their costs incurred in prosecuting this action.

POINT II

DEFENDANTS HAVE VIOLATED THE ANTITRUST LAW OF THE UNITED STATES AND PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF, PURSUANT TO 15 U.S.C. 26

Section 16 of the Clayton Act, 15 U.S.C. 26 entitles plaintiff litigants to injunctive relief against any threatened injury which may result to them from a violation of the antitrust laws. To obtain such relief the complaining party must only show that the alleged offender either already has violated the antitrust laws or that such a violation is impending and because of this violation the moving party is threatened with a loss or injury (see Zenith Radio Corp. v. Hazeltine Research, 395 US 100, 130 (1969) and that the plaintiff is engaged in the commerce which is being restrained by the defendant's antitrust violations (see Minnesota v. Northern Securities Co., 194 US 48, 70-71 (1904).

In our case, the defendants have clearly violated sections 1 and 2 of the Sherman Act and section 2(a) of the Robinson-Patman Act. In Point I of this memorandum, plaintiff has demonstrated the damages it has suffered by reason of defendants' violations of the antitrust laws. Defendants are continuing their policy of violating the antitrust laws and the plaintiff is continuing to be injured. In such a situation, 15 U.S.C. 26 clearly entitles

plaintiff to injunctive relief to prevent plaintiff from suffering any future losses.

CONCLUSION

The defendants have violated the antitrust laws and plaintiff is entitled to recover such damages as are set forth in Exhibit A. Plaintiff is also entitled to recover reasonable attorney's fees and the costs of this action.

In addition, plaintiff is entitled to an injunction, as set out in its proposed conclusions of law, enjoining the defendants from any continued violations of the antitrust laws which are causing damage to the plaintiff.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

by:

_____

With regard to defendants' alleged defense that it maintains the distribution system it now has because of a fear that independent wholesalers might become a conduit between franchised Ford dealers to allow franchised dealers to obtain a the wholesale incentive discount on parts which they use in their own repair operations, the Supreme Court in Otter Tail Power Company v. United States, 93 S.Ct. 1022, 1031 (1973) recently stated:

> " Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill. The argument is a familiar one. It was made in United States v. Arnold Schwinn & Co. 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249, a civil suit under §1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: 'The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct'."
> (emphasis supplied)

SOUTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

- x

FLM COLLISION PARTS, INC.
Plaintiff

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

73 CIV. 713 (TPG)

PLAINTIFF'S AMENDED

- x

HON. THOMAS P. GRIESA:

PLAINTIFF'S AMENDED ASSESSMENT OF DAMAGES

Losses to 9/30/74

1. Losses Due to Changes of Ford Motor Co.'s Policy with Regard to FLM: (11/1/72 to 9/30/74)

(a) Wholesale Incentive Credits Removal-

Cost of Parts Sold, Per FLM's Records, before premiums paid to dealers, and adjustments, 1/1/72-8/31/74	$1,111,232	
Sept. 1-20, 1974 Estimated	28,000	
Total Cost of Parts Sold, 11/1/72-9/30/74	1,139,232	
Incentive credits removed .16 x 1,139,232		= $ 182,277

(Note: While 25% is the incentive credit rate, past records show that the credits = 16% of overall FLM purchases).

(b) Obsolescence Credits Denied-

DEALERS:		
Fairview	19,452	
Thomas Motors	19,309	
Pleasantville	10,354	
	52,115	
Less, to be allowed	3,500	= 48,615

Sub-total carried to Page 2 $ 230,892

	Losses to 9/30/74
Sub-total carried from 1. 1)	230,892
(c) Stock Order Discounts Denied:-	
2% x Dealer Cost (Any items ordered on a weekly basis). (FLM Purchases of Ford Parts, 11/1/72 - 9/30/74	
Parkview $409,564	
Thomas Motors 280,203	
Pleasantville 407,462	
2% x $1,097,229	21,945
(d) Increase of Premium Paid to Dealers After 11/1/72 Cut-off from Attpu:	
Purchases from Ford Dealers 1,097,229	
Divided by 105 = Purchases Before Premiums 1,044,980	
Increase 2% x 1,044,980 =	20,900
(e) Loss of Goodwill of FLM Due to Lack of Earning Capacity as a Result of Ford's Change of Policy to FLM:-	
9-30-74 ✓	
Capital 392,213 x .08 Interest Factor $ 7,376	
Salary Factor -non-supervisory 40,000	
47,376	
Net Profit Before Taxes 30,491	
Officers' Salaries 83,200	
Pensions, Etc. 20,800 134,491	
Earnings for Goodwill Calculation 87,115	
(Ten Times 87,115) = Goodwill Value =	871,115
2. Loss of Stock Order Discounts Due to Loss of Sales Base 1/1/71-11/1/72: 22 Months Approx. Same Amount as 1(c). =	21,945
Sub-Total carried to Page 3	1,166,797

			Losses to 9/20/74
	Sub-total carried from Page 2		$1,166,797

3. Losses Due to Inability of FIM to Purchase Ford Sc. Parts Direct from Ford Motor Co.

FY	Cost of Parts Sold		Approx. Premiums paid to Dealers	
9/30/65 (Short Yr.)	66,836			
9/30/66	201,376			
9/30/67	276,121			
9/30/68	323,959			
9/30/69	345,112			
	1,213,404	x Approx. 2%	524,268	
9/30/70	444,665			
9/30/71	448,264			
9/30/72	512,244			
9/30/73	684,578			
10/1/73-9/20/74 (Part of Year)	549,462	Approx.		
	2,639,413	x Approx. 3%	79,188	
Approx. Total, Premiums paid to Dealers				103,456
Total Damages Before Attorneys' Fees & Costs				$1,270,253
Damages Trebled				3,810,759

4. Attorneys' Fees & Costs

Estimated Costs	1,000	
Attorneys' Fees	750,000	751,000
Total Proposed Assessment of Damages		$4,561,759

Dated New York, N.Y.
September 23, 1974

Respectfully submitted,

DAVID L. [illegible],
Attorney for Plaintiff,
250 West 57th Street
New York, N.Y. 10019
(212) CI 6-3880

Of Counsel:
Stuart [illegible]
David [illegible]

JULIEN & [illegible],

By [illegible],
a member of the firm
2 Lafayette St.,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION [illegible], Inc.,
Plaintiff

73 C.V. 713 (MP)

v.

[illegible] Co., et al.,
Defendants

ADDITIONAL PLAINTIFF'S [illegible] MAY OF DAMAGES.

5. Total Submitted 9/23/74 $4,561,759
Additional Damages 388,986 x Treble 266,958
Revised Proposed Assessment $4,828,717

Explanation of paragraph 5.

Loss of profit to FLM, due to interruption of [illegible] growth as a result of [illegible]'s campaign of policy to FLM and interference with [illegible]:

Fiscal Year Ended	(1) Net Profit before Corp. Income Taxes	(2) Officers' Salaries & Pensions	(3) Net Profit or (Loss) excluding officers' s/ens	(4) Increase of Col. (3) from prior yr.	(5) % of Increase
9/30/65*	850	6,750	7,600		
9/30/66	106	16,680	16,786	9,186	120.9
9/30/67	209	23,570	23,779	6,993	41.4
9/30/68	170	26,520	26,690	2,961	12.9
9/30/69	41,141	39,575	80,716	54,026	202.5
9/30/70	34,798	77,940	112,738	32,012	39.7
9/30/71	26,180	104,419	130,599	17,785	15.8
9/30/72	52,348	104,415	156,803	26,280	20.1
9/30/73	Loss (65,707)	65,160	(547) Loss	---	---
Est'd. 9/30/74	Loss (5[illegible],000)	48,350	(1,650) Loss	---	---

Calculation:

(a) Annual mean increase of profit before officers' accounts, 7 years 64.7%

(b) Annual mean increase of profit before officers' accounts, 4 years ended 9/30/72, 9/[illegible]/71, 9/30/72 25.2%

* 6 mos. annualized

(c) Projection of profit growth:

FY 9/30/73	Profit 196,803 x 125.2	=	$196,317
	Less		156,803
FY 9/30/73	Growth Increase Lost	=	39,514
FY 9/30/74	Projected Profit 196,317 x 119.3	=	245,780
	Less		196,317
FY 9/30/74	Growth Increase Lost	=	49,472
	TOTAL GROWTH INCREASE LOST to 9/30/74		$88,986

Respectfully submitted,

Dated, New York, N.Y.
September 24th, 1974

Attorneys for Plaintiff:

[illegible]
250 W. 57th St., New York, N.Y.10019
(212 CI 6-3080)

JULIUS [illegible], By:

Of Counsel
Stuart A. Shlaifer
David Goroglusian

[illegible],
A Member of the Firm,
2 Lafayette St.,
New York, NY 10007
(212 962-4070)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiff,	:	
-against-	:	73 Civ. 713 (TPG)
FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	

DEFENDANTS' SUPPLEMENTAL TRIAL MEMORANDUM
ON PRINCIPLES OF SCHWINN

SULLIVAN & CROMWELL,
Attorneys for Defendants,
48 Wall Street,
New York, New York 10005
(212) 952-8100

Robert MacCrate,
David Clayton Carrad

William A. Zolbert,
Office of the General Counsel,
Ford Motor Company.

Defendant's' Supplemental Trial Memorandum on Principles of *Schwinn*, September 30, 1974

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiff,	:	
-against-	:	73 Civ. 713 (TPG)
FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	

DEFENDANTS' SUPPLEMENTAL TRIAL MEMORANDUM
ON PRINCIPLES OF SCHWINN

This memorandum is submitted in response to the Court's request that the defendants* discuss applicability to this case of the principles set forth in U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) with respect to Section 1 of the Sherman Act (15 U.S.C. § 1).

I. The Principles Involved in Schwinn

A. The Holding

In Schwinn, the Court held that once a seller parted with title to its products, it could not, by agreement, restrict the persons to whom its customers might resell its products. The Court found that Schwinn prohibited its dealers from selling

* For the purposes of brevity, the term "defendants" will be used to refer to Ford Motor Company, Ford Marketing Corporation, or both, as appropriate. Prior to July 1, 1970, sales to its dealers were made by Ford Motor Company. Thereafter, such sales were made by Ford Marketing Corporation.

outside their assigned area and to anyone other than franchised Schwinn dealers. Failure to comply with these restrictions upon resale subjected the franchise to cancellation by Schwinn (Id. 371). The Court concluded that such vertically imposed restrictions on its customers' right to resell its products were violations of Section 1.

As illustrated by the cases discussed below, it is important to consider what the essential elements of the Schwinn holding are before attempting to apply it to different factual situations. Schwinn involved:

1. absolute and unconditional control by the seller over the customers with whom its dealers and distributors could deal . . .

> ". . .[E]ach Schwinn franchised retailer knows that he is . . . not a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer . . .
>
> "These distributors were instructed to sell only to franchised Schwinn accounts. . . ."
> 388 U.S. at 371

2. in cases where the seller had parted with title to its products . . .
3. and the seller enforced the restrictions by the threat of termination of its relationship with its dealers and distributors.

> ". . . Schwinn has been 'firm and resolute' in insisting upon observance of territorial and customer limitations by its bicycle distributors and upon confining sales by franchised retailers to consumers, and . . . Schwinn's 'firmness' in these respects was grounded upon the communicated danger of termination." 388 U.S. at 372.

B. Schwinn in Its Context

The Court held in Schwinn that Schwinn's insistence upon observance of territorial and customer limitations by its bicycle distributors and its enforcement of agreements confining sales by franchised dealers to customers violated Section 1.

Almost fifty years ago Justice Stone warned against reading Sherman Act cases out of context and thereby risking unwarranted results:

> "[I]t should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." Maple Flooring Manufacturer's Assoc. v. United States, 268 U.S. 563, 579 (1925).

The Third Circuit sitting en banc had occasion expressly to apply this caveat to Schwinn in Tripoli Company v. Wella Corporation, 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970) stating:

> "That case does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, Schwinn must be read, as must all antitrust cases, in its factual context." 425 F.2d at 936.

Thus fundamental rules of Sherman Act interpretation strongly caution against its unwarranted extension to the entirely different facts of this case.

C. The Subsequent Cases

Courts in various cases after Schwinn have held that price differential programs similar to the one before this Court do not violate Section 1. See, e.g., Checker Motors Corporation v. Chrysler Corporation, 405 F.2d 319 (2d Cir. 1969); Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. of Clms. 1971); Paddington Corporation v. Major Brands, Inc., 359 F.Supp. 1244 (W.D. Okla. 1973).*

Checker Motors, supra, involved a rebate plan under which the purchasers of taxicabs from a Chrysler dealer were entitled to receive an automatic cash rebate from Chrysler. In ruling that the discount did not violate Section 1, the Second Circuit declared:

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* It is noteworthy that plaintiff fails to cite a single post-Schwinn decision invalidating a wholesale incentive program similar to defendants' in its Reply Memorandum. A diligent search by defendants has also failed to find such a case.

> "All that is required by § 1 for the discount by Chrysler to be valid is that the pricing independence of the individual dealer remain unimpeded." 405 F.2d at 323 (emphasis added).

Of particular relevance to the instant case is the Court's suggestion that a more desirable promotional (incentive) plan than Chrysler's would be one providing for direct reductions in wholesale price paid by the franchised dealer, more akin to the incentive plan employed by Ford when its dealers act as wholesalers. The Court quoted with approval the following language of the lower court:

> "The plan does not give as much practical pricing flexibility to the Chrysler dealer as would a direct $183 price reduction in the wholesale price, since the customer, rather than the dealer, is automatically entitled to the rebate upon purchase of a Chrysler taxicab, whereas if Chrysler reduced the price to its dealers by $183, bargaining between each dealer and his customer might ensue to determine how much of the reduction, if any, would be passed along to the retail customer." 405 F.2d at 322.

In Carter-Wallace, supra, the Government asserted by way of defense against a charge of unauthorized use of plaintiff's invention that plaintiff had violated Section 1 by selling its patented drug to certain drug companies with the restriction that these companies could resell this drug only in combination with specified other drugs. The Court of Claims disagreed, ruling that resale restrictions were imposed only if the drug was purchased at a preferentially

lower price and anyone purchasing at the higher price was free to resell on any terms he desired. In rejecting the Government's assertion that Schwinn rendered such differential pricing per se unlawful, the Court stated:

> "But we do not think that . . . Schwinn, understood in [its] setting, stands[s] for that rigid and procrustean proposition, nor that the existing case law supports any such rule. No decision of which we are aware calls the mere existence of differential pricing practices comparable to those now before us a violation of the Sherman Act." 449 F.2d at 1379 (emphasis added).

Paddington, supra, involved a discounting practice somewhat similar to the instant one. There the plaintiff, an importer and distiller of scotch whiskey had established a policy of granting substantial discounts to wholesalers who represented or agreed to resell only in the "duty free" market outside of the United States. The defendant, who had received the discount but then sold within the United States, argued that any such agreement was unenforceable citing Schwinn and United States v. Glaxo Group Ltd., 302 F.Supp. 1 (D.Del. 1969).

In ruling that the discounting practice did not violate Section 1, the Court in Paddington distinguished Schwinn and Glaxo, as follows:

> "However, these two cases are clearly inapposite. In each the Court found a violation of the antitrust laws where the manufacturer had engaged in an admitted, comprehensive scheme to control the resale and/or method of resale of its products. Further, Glaxo also involved a larger agreement between Glaxo and one of its competitors to divide markets and sales between themselves. On the contrary, the most that existed in the instant case was an agreement between Paddington and a purchaser who was given a preferential price upon its express representation that it would only resell the goods in a market which did not compete with the United States domestic markets." 359 F.Supp. at 1250.

As should be evident, the discounting systems and attendant resale limitations found valid in both Carter-Wallace and Paddington are considerably more restrictive than the defendants' wholesale incentive policy. In both Carter-Wallace and Paddington the purchaser's freedom to resell was restricted at the outset -- at the time of initial sale -- since only then could it take advantage of the discount by agreeing either to resell the product as part of a particular combination or resell the product to customers in particular territories. In the instant case, by way of contrast, the franchised dealer is free to decide whether to take advantage of the wholesale incentive up to the very moment of resale. Under this system, the franchised dealer exercises his own independent judgment to determine whether the economics of the market place at the time of resale

warrant his assumption of the wholesaling function thereby qualifying him for the wholesale incentive. In any event, the franchised dealer is absolutely free to sell to anyone, at any time and at any price.

II. The Question Presented

The question presented in this case is whether, under Section 1, an incentive offered by the defendants to their dealers to sell to independent garages and body shops, but not to others, is the equivalent of agreeing with their dealers that they cannot sell to other customers for which sales no incentive is paid by defendant. Defendants respectfully submit that the answer to this question is clearly "no".

Here there is an offer, not an agreement; a promotion, not a restraint; an incentive, not a restriction.

III. The Application of the Principles to this Case

A. There is No Conspiracy

The plaintiff's argument is unsound for the simple reason that Section 1 requires a "contract, combination or conspiracy" in restraint of trade and FLM has presented no evidence of an agreement not to pay incentives on sales to it. The fact is that the decision to begin paying incentives on sales of crash parts for resale was made at the insistence of the Federal Trade Commission and the decision to modify

the policy in 1971 so that certain sales would not qualify for the incentive was made unilaterally for sound business reasons which are discussed later in this memorandum and which will be explained in more detail by defendants' witnesses. Consequently, one of the primary elements of a Section 1 violation is missing in this case.

B. There is No Restraint

Assuming arguendo that FLM could show an agreement pursuant to which defendants changed their wholesale incentive policy, plaintiff's reliance on Schwinn is still misplaced.

In Schwinn, the prohibition against sale to certain classes of customers was absolute and unconditional. Schwinn's retailers and distributors agreed with Schwinn not to make the prohibited sales and their franchises were subject to cancellation if they did not abide by their agreement. Contrast this with the situation in the present case. FLM does not and cannot contend that defendants' dealers have agreed with defendants not to sell to it. FLM has presented evidence that it continues to purchase from defendants' dealers. There is nothing in defendants' Sales and Service Agreement with their dealers that restricts the right of the dealers to choose the customers with whom they will deal. (See Paragraph 3(a) of the defendants' Sales and Service Agreement. Defendants' Exhibit A for identification.)

FLM contends, however, that the refusal of defendants to pay wholesale incentives to their dealers on sales to FLM as defendants formerly had done under the pre-1971 policy accomplishes the same end because it is no longer economically feasible for FLM to purchase from defendants' dealers and resell in competition with them. This argument is fallacious for several reasons. The first, and most important, is that the "restraint" required for application of the Schwinn doctrine is simply not present. A differential in price does not amount to a violation of Section 1. See Checker Motors, Carter-Wallace and Paddington, supra at pp. 4-8. In addition, Schwinn neither bars incentive programs, nor regulates a sellers choice of customers.

1. Inducement by incentive in not equivalent to restraint by restriction

In Schwinn, the Court held unlawful the unreasonable use of the "stick" (threat of cancellation of the dealer's franchise) to enforce a policy of restricting the resale of its products. The Court did not suggest that a policy of providing a "carrot" (incentives) to the seller's customers to induce them to distribute in the fashion deemed desirable by the seller is unlawful. A distinction must and has been made by subsequent decisions between (a) enforcement of a restrictive policy by refusal to deal and similar means and (b) encouragement of a customer to follow a desired pattern

of distribution by providing incentives for him to do so. There are several reasons for this distinction.

The Court in Schwinn articulated the test to be applied to determine whether such policies violate Section 1 in the following:

> "Our inquiry is whether, assuming non-predatory motives and business purposes and the incentive of profit and volume considerations, the effect upon competition in the marketplace is substantially adverse. 388 U.S., 375 (emphasis added).

The "carrot" versus "stick" dichotomy is useful to underscore the different competitive effects these two practices may have. Schwinn points out that the "stick", compelling under penalty particular conduct by the purchaser, may have an anticompetitive effect, while Checker Motors, Carter-Wallace and Paddington establish that the "carrot", inviting particular conduct by the purchaser in the exercise of his free and independent judgment, does not.

2. Schwinn does not regulate a seller's choice of customer

Regardless of whether defendants' price differential program is viewed as a restriction or an incentive, plaintiff may not compel defendants to deal with it. To read Schwinn as so requiring would be inconsistent with the Court's holding in U.S. v. Colgate & Co., 250 U.S. 300 (1919) that a seller

may choose, absent a conspiracy, the people to whom it will sell. But, reduced to its simplest terms, this is what plaintiff demands: defendants must either sell to it directly or make available to their dealers an incentive which will enable them to sell to FLM at the same price it could obtain if it purchased directly.

Since the net effect of plaintiff's demands are the same, defendants are faced with a Hobson's choice. Neither Colgate nor Schwinn compels defendants to make such a selection. Additionally, plaintiffs' argument overlooks the express language of Section 2(a) of the Robinson-Patman Act which provides that "nothing herein shall prevent persons engaged in selling goods, or merchandise, in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." And, as pointed out in defendants' Trial Memorandum at page 23, the Courts have uniformly observed this principle, it would indeed be anomalous for the plaintiff to read this statutory language out of existence by an inappropriate application of the Schwinn case.

Plaintiff's contention that the Schwinn case forbids defendants from refusing to pay a wholesale incentive on sales by their dealers to plaintiff, if carried to its logical conclusion, would also forbid defendants from

returning to the one price system they had for crash parts before the institution of wholesale incentives on such parts in 1968. The economic result would be the same since the plaintiff would no longer have available to it the profit margin which it claims is necessary to permit it to continue to wholesale crash parts.* However, it is difficult to understand how such a one price system could violate Schwinn, since there is nothing clearer under the Robinson-Patman Act than the principle that where the same price is charged to all customers, there can be no violation. See Sano Petroleum Corp. v. American Oil Co., 187 F.Supp. 345 (E.D.N.Y. 1960).

C. The Wholesale Incentive Is a Valid and Accepted Type of Functional Discount

Assuming, then, that some form of discounts may be allowed, how may the defendants, or any other seller, offer them? The plaintiff would argue that the discounts must apply to all sales since the Schwinn decision forbids that they be granted on the basis of the type of customer to whom the goods are resold. Such a distinction between customers, however, is the whole basis of functional discounting. A functional discount is granted on the basis that when a customer of the seller resells to certain classes of his customers, a different function is performed

* It should be noted that plaintiff not only survived, but almost trebled its sales in 1965-1968 on a gross profit margin of 17% to 18% under defendants' former one-price system.

than when he resells to other classes of customers. As an example, a distributor of spark plugs receives a different discount when he resells to a wholesaler than when he sells to a retailer. For a thorough discussion of the rationale under the Robinson-Patman Act of functional discounting see Doubleday & Co., 52 F.T.C. 169 (1955).

Obviously, when a purchaser receives a functional discount on sales to certain customers, he may resell to that class of customers at a lower price if he wishes. To this extent, his seller has made it economically more attractive for him to sell to certain classes of customers and, correspondingly, may have made it economically more difficult for the other classes of customers to compete with the "favored" class if the purchaser chooses to pass along the advantage to the "favored" customers. Plaintiff's contentions ignore that the principle of functional discounting is well established under the Robinson-Patman Act. Moreover, the Checker Motors, Carter-Wallace and Paddington cases (supra) clearly demonstrate that the practice is not violative of Section 1.

D. Plaintiff's Role Does Not Warrant an Incentive.

Plaintiff argues that it performs the function that defendants desire to promote by offering the wholesale incentive and, therefore, sales to it should be eligible for the incentive. That is, plaintiff contends that it sells to independent body shops just as defendants' dealers do in order to earn the wholesale incentive. This argument ignores the fact that plaintiff has no business relationship with defendants, and defendants, therefore, have no obligation to plaintiff to reward it for performing the function.

There is the further fundamental flaw in plaintiff's argument that it ignores the original purpose of the incentive, which was to provide a means for defendants' dealers to sell to independent body shops at prices comparable to those paid by the dealers when they buy the same parts for use in their own body shop operations. By interceding between the dealers and the body shops, FLM introduces an unnecessary step in the chain of distribution and an additional entity desiring a margin of profit which translates to an additional cost to the body shops. In other words, FLM performs no function that the dealers are not capable of performing, but only adds additional cost to the distribution system when viewed from the point of view of the independent body shop.

Plaintiff's contract with Central Lincoln Mercury in April 1969 (Defendants' Exhibit O) within which it launched its business as a wholesaler in crash parts, confirms the inherently artificial quality of the role in crash parts distribution which FLM seeks to play. The contract was in its essence one to buy parts from Central, but to use the name, credit and franchise of Central as a cover for its business which was basically duplicative of the wholesaler function carried on by franchised dealers.

For the first three and a half years of its business life FLM was unable to fulfill the scheme of its contract with Central to gain the use of a second customer parts code number issued in the name of Central. During that period its economic position in the crash parts market and its margin of profit was basically the same as it is today. It represented an added cost of distribution between the wholesale and retail level.

FLM's temporary success between 1968 and 1971 in acquiring, in violation of Ford policy (albeit through the error of local Ford personnel), the masquerade of Central's secondary parts code permitted FLM in the single crash parts phase of a franchised dealer's overall business to

step into the shoes of a franchise dealer -- without, of course, its concomitant responsibilities.

FLM's acquiring the masquerade of Central's second code number coincided with the introduction, at the behest of the FTC, of an incentive to make the wholesaling of crash parts more attractive to dealers. Together, the second code number and the wholesale incentive appear to have given FLM a period of exceptionally high profitability which was in no way warranted by the economic role it in fact played.

In addition to performing no function that the dealer cannot, FLM's interposition in the chain of distribution below defendants' dealers deprives the defendants of the opportunity to audit the records which support the claims made for incentives. While a dealer is required by Paragraph 12 of his Sales and Service Agreement to maintain records to substantiate his claims and to make them available to defendants for audit, FLM is under no such obligation. Moreover, by using an intermediary such as FLM, defendants' dealers could reduce their acquisition cost for crash parts used in their own body shops below that available to independent body shops in a manner difficult for incentive analysts who police the claims for allowance to detect.

For example, assume that the suggested list price of a crash part is $10.00, the dealer net price is $6.00 and the wholesale incentive is $1.50. If a dealer used that part in its body shop, its acquisition cost would be $6.00. Similarly, if the dealer sold it to an independent body shop at the dealer net price (defendants' recommended "General Trade Price"), the independent body shop would also have an acquisition cost of $6.00 and the dealer would retain the $1.50 wholesale incentive as its gross margin. However, if a dealer sold to FLM at approximately $4.50 (dealer net less the wholesale incentive -- the practice followed prior to 1972 according to the evidence), FLM could sell to another dealer at less than $6.00. In this situation if dealers were to sell reciprocally to each other through intermediaries, defendants could only audit their dealers' records and those records would simply reflect a sale to FLM qualifying for wholesale incentive. The records would conceal the net effect of the transactions, which would be the sale from one dealer to another.

While the payment of incentives on sales to wholesalers presents the various problems set forth above, a different arrangement is permissible under defendants' established policy which presents no such difficulties. If FLM were to act as the dealer's agent in selling crash parts to

eligible customers, the dealer could claim the wholesale incentive and pay a commission to FLM for its services. In such a case defendants could audit the records of the dealer to insure that incentive is paid only on eligible sales and the plaintiff would be fully compensated for its efforts.

CONCLUSION

For the reasons stated above, there is no basis in defendants' policies for finding a violation of Section 1 of the Sherman Act.

Dated: September 30, 1974
New York, New York

Respectfully submitted,

SULLIVAN & CROMWELL,
Attorneys for Defendants,
48 Wall Street,
New York, New York 10005
(212) 952-8100

Robert MacCrate,
David Clayton Carrad

William A. Zolbert,
Office of the General Counsel,
Ford Motor Company.

Plaintiff's Supplemental Trial Brief,
September 30, 1974

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
FILM COLLISION PARTS, INC.,

Plaintiff,

73 Civ 713 (TPG)

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.
- x

PLAINTIFF'S SUPPLEMENTAL TRIAL BRIEF

Copy received
3:55 p.m. September 30,
1974. D. P. Conrad

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713 (TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

----------x

PLAINTIFF'S SUPPLEMENTAL TRIAL MEMORANDUM

Point I

The defendants' acts in restricting the persons to whom its franchised dealers may sell Ford crash parts after the dealer has acquired title to the parts violates Section 1 of the Sherman Act as was made clear by the Court in United States v. Arnold, Schwinn and Co. ("Schwinn"), 388 U.S. 365 (1967).

The defendants in their supplemental trial memorandum attempt to distinguish Schwinn based on four Lower Court cases. Each of which is a special situation and totally different from the facts in our case. We shall discuss each of the cases relied upon by the defendants in support of their position that the defendants' wholesale incentive plan does not violate Schwinn.

The defendants relied upon Checker Motors Corporation v. Chrysler Corporation, 405 F.2d 319 (2d Cir. 1969). In Checker Motors, Chrysler had initiated a plan whereby anyone who purchased a Chrysler taxi-cab from an authorized Chrysler dealer could receive a cash rebate directly from Chrysler. The purchaser of the taxi-cab would apply for the rebate directly to Chrysler and would receive his check from Chrysler. There was no restriction as to whom its franchised dealers could sell taxi-cabs to, and anyone who bought a taxi-cab was eligible for the rebate. Checker Motors has nothing at all to do with the restraint on customers prohibited by Schwinn, and the Court in Checker Motors makes no mention of Schwinn. Nor, does the language cited on page 5 of the defendants' supplemental trial memorandum sanction the defendants' wholesale incentive plan which is, in our case, totally different from the plan Chrysler had used.

The defendants also rely upon Tripoli Company v. Wella Corporation, 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970), for the proposition that their wholesale incentive plan has not violated the doctrine set out in Schwinn. Tripoli was a situation where a distributor of certain beauty products and barber supplies restricted its wholesalers from reselling products intended for professional use to non-professional retail customers. The manufacturer justified its restriction on the ground that professional products had a different chemical composition and did not contain the warnings which were used on the products which were sold directly to consumers, and that if its wholesalers sold such professional products to the general public, members of the public could be injured and the manufacturer could be potentially liable for selling dangerous products. Under those special circumstances, the Court found that there had not been a per se violation of Section 1 of the Sherman Act.

In essence, what the Court said in Tripoli was simply that even a per se rule had to be read with reasonableness and that it could not be deemed a violation of the antitrust laws as, for example, a gun manufacturer authorizing its dealers to sell

pistols only to those persons who had a license for them and not to children or the general public. Tripoli is thus a case limited to its own facts and is inapplicable to our situation where what is being sold are crash parts for automobiles, and the plaintiff is highly knowledgeable in the business.

The defendants rely upon Paddington Corporation v. Major Brands, Inc., 359 F.Supp. 1244 (W.D. Okla. 1973), as authority for the proposition that their wholesale incentive program was not violative of Schwinn. In Paddington, a liquor distiller moved to enjoin a liquor wholesaler from engaging in unfair deceptive practices and trademark infringement. As a defense, the defendant raised the Sherman Act and the Schwinn doctrine.

The facts in Paddington are that through an intermediary who misrepresented the facts to the liquor distiller, the wholesaler managed to obtain duty-free merchandise which must be sold abroad from the distiller. The wholesaler then paid the necessary duties and altered the labels on the liquor bottles in various ways in order to mislead the public as to its origin. The Court found that the wholesaler was guilty of violating the Oklahoma

Deceptive Trade Practices Act and the Lanham Act and, under those circumstances, refused to permit the defendant to use Schwinn as a defense to its outrightly deceitful activities. The Court then distinguished the Paddington situation from Schwinn by pointing out that in Paddington the liquor wholesaler had obtained a special preferential price upon an expressed condition that it would resell the liquor only outside the United States and determined that such a special situation could be distinguished from Schwinn where there was a general restriction on goods sold by the manufacturer. Paddington has apparently never been appealed or ruled on except by the District Court of Oklahoma, and although the legal reasoning behind Paddington is dubious, it is apparent that the Court in Paddington is attempting to prevent a wrongdoer from using Schwinn as a shield to hide his misdeeds.

Similarly, Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. of Claims 1971), is relied upon by the defendants as authority for the proposition that its activities have not violated Schwinn. Carter-Wallace likewise was a special situation in which the United States had obtained a consent judgment directing Carter-

Wallace to sell certain drugs to all purchasers at a maximum selling price as part of an antitrust suit settlement. Carter-Wallace then sold certain drugs to certain pharmaceutical houses at a considerably lower price if they would use those drugs for certain purposes only.

In a subsequent action by Carter-Wallace against the United States for patent infringement, the Government, in part, defended its actions based upon the plaintiff's alleged violation of the antitrust laws. The Court there distinguished Schwinn on the grounds that under the antitrust consent judgment, all purchasers had a right to purchase patented drugs at a certain maximum price, and that if certain companies wanted to enter into a special arrangement whereby they would pay a lower price for the drugs if they used them for a certain purpose and it would benefit the manufacturer of the drugs in various ways (see 449 F.2d at 1382), then it could not be said there had been a per se violation of Schwinn. Again, we are dealing with a special situation where, in effect, the companies who had obtained the drugs at a special lower price with a restricted use on them could be said to somehow be involved in a joint venture agreement with the manufacturer of the drugs in question, and the Court

here as well as in Paddington was attempting to prevent a party who had infringed certain patent rights from finding cover behind the antitrust laws.

In any case, the validity of Carter-Wallace must be questioned in light of the Court's decision in United States v. Glaxo Corporation, Limited, 93 S.Ct. 861 (1973). In that case, the Court upheld the Lower Court's decision finding a per se violation of Section 1 of the Sherman Act when a manufacturer attempted to control the resale of his drugs once he had parted with title to them.

In the District Court decision which was affirmed completely as to this point by the Supreme Court, the District Court had stated in no uncertain terms with regard to the defendant's defense that it was limiting the persons to whom its drugs might be resold in order to form standards of safety for its final product. The Court said, "However laudable the motive and unpredictable the rule, this is, under Schwinn, a per se violation of Section 1 of the Sherman Act." (302 F.Supp. at 9) The Court went on to say:

> "... The Supreme Court found that the mere existence of such restraints was henceforth to be enough to show a violation of the Sherman Act. It considered the doctrine of ancillary res-

> traints specifically only where no sale was involved. It would be presumptuous to say the least for this Court to read the rule of reason back into a sale situation; that possibility has been foreclosed."
> (302 F.2d at 10)

In light of the Supreme Court's complete affirmance of the District Court's decision with regard to the Schwinn point, the validity of Carter-Wallace which was decided prior to the Supreme Court's opinion in Glaxo is dubious.

From the foregoing analysis, it is obvious that all of the cases cited by the defendants as alleged authority for the proposition that the defendants have not violated the Schwinn doctrine in this case are distinguishable, and do not condone the defendants actions in this case. The defendants, in this case, have clearly violated the doctrine set out in Schwinn which constitutes a per se violation of Section 1 of the Sherman Act.

On page 4 of their supplemental trial memorandum in a footnote, the defendants state that the plaintiff has failed to state a single post-Schwinn case which has invalidated a program similar to that of the defendants. The reason for that may be the obvious one, that no other manufacturers after Schwinn had the AUDACITY to promulgate a distribution setup which is in direct violation of Schwinn.

On page 8 of their supplemental trial memorandum, the defendants again make a reference to the fact that they began paying incentives to franchised Ford dealers on sales of crash parts at the insistence of the Federal Trade Commission. This is apparently done in an attempt to convey the impression that the Federal Trade Commission has in some way approved the present distribution system of the defendants. The Federal Trade Commission has in no way approved the present crash part distribution system of the defendants. In fact, in a very similar situation, the Commission issued an advisory opinion in response to a manufacturers request and stated in no uncertain terms:

> "(2) Moreover, as to the other functional criteria for Full Service Dealers or Wholesalers set forth in applicant's proposed wholesaler agreement, the Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him."
> (See 16 CFR 15.333)

The remainder of the defendants' arguments in its supplemental trial memorandum border on the frivolous. On page 15 of its memorandum, the defendants take the position that by interceding between the dealers and the body shops the plaintiff has introduced an unnecessary step in the chain of distribution thereby making crash parts more costly to the body shops. The

argument is absurd. No body shop is compelled to buy from the plaintiff, and obviously no body shop would buy from the plaintiff unless it were economically beneficial for it to do so.

On page 16 of their supplemental trial memorandum, the defendants seem to insinuate that the plaintiff was involved in some sort of fraudulent scheme with Central as a cover. Exhibit 10, the Sept. 20 1968 letter from Central to Ford made it clear to Ford precisely what the relationship between Central and FLM was, and that there was no fraud or misrepresentation at all on the part of the plaintiff.

On page 17 of their supplemental trial memorandum, the defendants take the position that if the plaintiff is permitted to continue in business and the defendants' franchised dealers are permitted to receive a wholesale incentive for sales to the plaintiff, it is possible that the plaintiff could act as a conduit for sales by the franchised dealers so that they would be able to obtain the wholesale incentive for parts used in their own repair operations. In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Court cited with approval the statement made by the Schwinn Court that:

> "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct."

If the defendants wish to prevent certain wholesalers from acting as conduits among franchised Ford dealers, they must find a legal method for doing so. In addition, the defendants have an absolute right pursuant to their franchised agreement to audit all of their franchised dealers so that by auditing their dealers, the defendants can readily discover whether or not the dealers are purchasing crash parts from an intermediary and receiving the wholesale incentive on crash parts used in their own repair operations.

Finally, the defendants have admitted that FLM's sales were all made to body shops, and that it was not serving as a conduit for cross sales among Ford dealers.

Point II

The plaintiff is entitled to recover for the profits lost by virtue of the defendants' violation of the antitrust laws, and it need not prove those lost profits by precise computation.

In Bigelow v. RKO Radio Pictures, 66 S.Ct. 574 (194), the plaintiff had been injured by the defendant's violation of the

antitrust laws and sought to recover his damages. The defendant claimed that the damages being claimed by the plaintiff were too speculative and uncertain to be permitted. The Court reject the defendant's contentions and stated that:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act on probable and inferential as well as (upon) direct and positive proof." Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 561-564, 51 S.Ct. 250, 251, 75 L.Ed. 544; Eastman Kodak Co. v. Southern Photo Material Co., supra, 273 U.S. 377-379, 47 S.Ct. 404, 405, 71 L.Ed. 684. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.
>
> "Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. v. Sealright Co., 2 Cir., 141 F.2d 972, 979. That principle is an ancient one, Amory v. Delamirie, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application."

The rule that in antitrust actions the plaintiff must not prove his damages with exactitude since it is often difficult to prove the precise measure of profits which have been lost by the plaintiff due to the defendant's unlawful actions has been the rule in the Second Circuit even prior to Bigelow. In William H. Rankin Co. v. Associated Bill Posters, 42 F.2d 152 (2d Cir. 1930), cert. denied, 282 U.S. 864 (1931), the Court allowed the plaintiff to show by the testimony of its treasurer what he considered would have been the normal increase of business if not for the defendant's unlawful interference and permitted him to estimate from that the probable yearly earnings for the years between 1913 and 1918 based upon the profits of his firm in 1911. The Court stated in language directly applicable to our case:

> "This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony."

This has remained the rule in the Second Circuit throughout the years. [illegible] Theatres, Inc. v. Paramount Pictures,

Inc., 176 F.2d 594 (2d Cir. 1949). This was reaffirmed by the Second Circuit in Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (1970). See also Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974).

Based upon the evidence submitted and the testimony of David Wasser, the plaintiff has provided the reasonable basis upon which its lost profits due to the defendants' violation of the antitrust laws can be calculated.

Conclusion

The defendants have committed a per se violation of Section 1 of the Sherman Act, and the plaintiff is entitled to recover all of its damages including its lost profits which it has suffered due to the defendants' actions.

Dated: New York, New York

September 30, 1973.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for the Plaintiff

Plaintiff's Additional Trial Memorandum,
September 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

73 Civ. 713 (TPG)

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

PLAINTIFF'S ADDITIONAL TRIAL MEMORANDUM

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.
- x

PLAINTIFF'S ADDITIONAL TRIAL MEMORANDUM

STATEMENT

This memorandum is purposed to show that in addition to the Schwinn liability, a parallel finding of price fixing and trade restraint results from a consideration of the cases of U.S. v. General Motors, 384 U.S. 127 and U.S. v. Parke-Davis & Co., 362 U.S. 29.

The Parallel Situations and Rulings in the General Motors Case

General Motors, without threatening or causing the discontinuance of any dealer franchiser's approval, called upon dealers to stop selling independent houses which were selling Chevrolets at reduced retail prices. The Supreme Court said:

> "That there had been no 'agreement' among the defendants and their co-conspirators (but) it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan."
> (pp. 142-143)

In that case General Motors had claimed that it and its dealers had a lawful interest in "protecting the franchise system of distributing automobiles" (p. 142). In our case, it is stipulated that after defendants took their action of cutting off the plaintiff, who thereafter never received a wholesale incentive allowance. The very method of filling out a form showing the purchaser, in order to secure the wholesale allowance, is obvious enforcement vertically of Ford's declaring FLM ineligible for such an allowance.

These forms and the right to audit the franchisers' books of account, which is provided for in their franchise agreement, provides surveillance for Ford to enforce its mandate that no non-eligible wholesaler may receive this huge wholesale incentive benefit.

As the Supreme Court said in the General Motors case:

> "This pressure for achieving and enforcing the desired objective can, by no stretch of the imagination, be described as 'unilateral' or merely "parallel'." (p. 145)

FLM was an eligible wholesaler before June 1971. Ford's revision of its rules so as to eliminate a benefited wholesaler places the plaintiff at an enormous competitive disadvantage and it had to compete thereafter at a below cost basis with everyone of Ford's own wholesalers who received a 25% discount on a massive flow of crash parts. This action by Ford which, by means of its auditing and allowing incentive and wholesale discounts on forms presented to it, effectively eliminates the plaintiff from the wholesale market. The Court in the General Motors case said:

> "Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act." (p. 145)

The fact that plaintiff could still get goods but only at discriminatory price terms does not lessen the Sherman Act violation. The General Motors' decision quotes from Klor's Inc. v. Broadway-Hale Stores Inc. 359 U.S. 207 to the effect that it was a violation to allow sales "only at the discriminatory prices and highly unfavorable terms." (p. 143)

If the effect of the prohibited trade practices hurts but one trader, and in our case it appears that FLM is unique (see Exhibit

> "The Court concluded that the alleged group boycott of even a single trader violated the statute without regard to the reasonableness of the conduct in the circumstances. Group boycotts of a trader, said the Court, are among those 'classes of restraints which from their "nature or character" were unduly restrictive . . . . ' 359 US, at 211, 3 L ed 2d at 744. This was not new doctrine, for it had long been recognized that 'there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use', and that group boycotts are of this character."
> (384 US 127, 145-146)

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U Pa L Rev 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than

> by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed--as in Fashion Originators' Guild of America, Inc. v Federal Trade Comm'n, supra, 312 US at 468, 85 L ed at 954."
> (384 US 125 at pp. 146-147)

Thus, the substantial discrimination in price allowances which results in the elimination of the wholesaler from equal access to the market is a per se violation, "and the per se rule applies even when the effect upon prices is indirect". (384 U.S. 127 at 147)

The Parallel Situations and Rulings in the Parke-Davis case

Even if Ford's original action was unilaterally valid by the enforcement through the wholesale inventory discount system and forms to be submitted, the effect is the equivalet of that of a conspiracy for, vertically, the dealers are compelled to adhere to Ford's ukase. In U.S. v. Parke, Davis 362 US 29, the action was unilaterally taken by the manufacturer but enforced through its method of distribution. The Supreme Court held that:

> "the nonexistence of contracts covering the practices was irrelevant since '(t)he specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as

> agreements express or implied intended to accomplish the same purpose' Id at p. 455)."
> (362 US 41)

Parke Davis quoted there the previous case of Federal Trade Comm'n v. Beech-nut 257 US 441 saying:

> "Beech-Nut's methods were as effective as agreements in producing the result that 'all who would deal in the company's products are constrained to sell at the suggested prices', 257 US at 455, the Court held that the securing of the customers' adherence by such methods constituted the creation of an unlawful combination to suppress price competition among the retailers."
> (362 US 42)

In our case if a franchised dealer should attempt to sell at wholesale allowances to the plaintiff, it would be disallowed the wholesale incentive by defendants. Additionally, the exhibits show Rose, defendant's New York District Sales Manager, to have actively visited Atlas and Parkview, Ford dealers, to notify them of FLM's wholesale incentive cutoff (pp. 3 and 4 11/1/72 letter from Rose to Parkview Exhibit 32). Another letter from Rose to Hackewitz, [illegible] parts manager of Teterboro Parts, asks to be notified who FLM is trying to get parts through (Pl. 15 for Ident.). And there is a reply from Hackewitz advising Rose who FLM is dealing with (Exhibit Pl, 16 for Ident.).

Even unilateral action by a purchaser does not eliminate a Sherman Act violation where he employs means to

secure adherence to his suggested prices or restrain trade.

Parke, Davis has ample language on that. In 362 US at 43 it states:

> "The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a manufacturer's announced policy, independently decides to observe specified resale prices.
>
> "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a comination in violation of the Sherman Act."
> (362 US at 43,44)

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

by:

_____

§6 POST-TRIAL DEVELOPMENTS

Letter from David L. Wasser, Esq., to Alfred S. Julien, Esq. (with attachments), October 24, 1974

Wasser Ex. 35

DAVID L. WASSER
COUNSELLOR AT LAW
250 WEST 57TH STREET
NEW YORK, N. Y. 10019
CIRCLE 6-3880

20 DEERWOOD DRIVE
NEW CITY, N. Y. 10956
ROCKLAND COUNTY
914 NE 4-9006

October 24, 1974

Alfred S. Julien, Esq.
Julien & Schlesinger, P. C.
2 Lafayette Street
New York, New York 10007

Re: FLM Collision Parts, Inc. v. Ford Motor Company and Ford Marketing Corporation
73 Civ. 713 (TPG)

Dear Mr. Julien:

The following is submitted in response to the inquiry of October 16, 1974 of Robert MacCrate, Esq., of Sullivan & Cromwell, for an explanation of the audit procedures used in compiling my statement of wholesale incentive credits lost by plaintiff from November 1, 1972 - October 8, 1974:

1. The three methods were used and the test folders were selected under my supervision as a C.P.A. to test each method for validity in relationship to the other two methods, and without regard to the results arising from the use of these methods;

2. Under method number one, it was found that the wholesale incentive credits allowed for the thirteen months before the "cut-off", 10/1/71 - 10/31/72, was 17.2 per cent of the $548,123.87 purchases of Ford parts for the same period; using this percentage as a level condition prior to the "cut-off", the 17.2 per cent was averaged with the 12.4 per cent rate of credits over purchases of the $90,855.41 amounts of Ford parts purchases selected from invoices at random for August, 1974; a straight-line mean average of the "beginning and end" resulted, namely, 14.8 per cent, which, when multiplied by total Ford parts purchases of $1,122,659 for the period 11/1/72-9/20/74, resulted

DAVID L. WASSER
COUNSELLOR AT LAW
250 WEST 57TH STREET
NEW YORK, N. Y. 10019
CIRCLE 6-3880

28 DEERWOOD DRIVE
NEW CITY, N. Y. 10956
ROCKLAND COUNTY
914 NE 4-9096

in an incentive credit amount of $166,154; to this was added an estimated incentive credit amount of $4,517, to update the total credits to October 8, 1974; this latter figure was based upon the calculation of 14.8 per cent times estimated purchase invoices of $27,820 for the period, 9/20/74 - 10/8/74, plus $400.00 estimated credits on shipped but unbilled purchases.

The notation for August, 1974 regarding "Pintos, etc. excluded," was not with reference to any audit procedure used by me, but referred to my understanding that August, 1974 was in the period when Ford Motor Company had selectively omitted certain crash parts from wholesale incentive credit eligibility, such as Pintos.

3. Under method number two, at random folders of invoices were examined for a compilation of the known incentive credits allowable as per Ford price books for the periods of the shipments, and a compilation was also made of the total Ford parts purchases of the invoices of each folder.

Invoices were examined representing $294,730.76 of Ford parts purchases for the period November 1, 1972 - September 20, 1974, or 26.3 per cent of the $1,122,658.81 total Ford parts purchases for that period.

(1) Methods number one and three resulted in similar percentages;

(2) In compiling eligible credits under method two, no weight was given by the compilers to items which might have been eligible but were not obviously eligible; thus many eligible

DAVID L. WASSER
COUNSELLOR AT LAW
250 WEST 57TH STREET
NEW YORK, N. Y. 10019
CIRCLE 6-3880

28 DEERWOOD DRIVE
NEW CITY, N. Y. 10956
ROCKLAND COUNTY
914 NE 4-8096

items might have been missed (it would have been too time-consuming and costly to check all items on the invoices against the eligibility credit lists in the price manuals).

The $41,435.54 incentive credits allowable under method number two were then divided by 26.3 per cent to arrive at a total figure of $157,542 credits allowable for 100 per cent of the purchases, 11/1/72 - 9/20/74; an amount of $3,939 was then calculated as an estimate of the credits from 9/20/74 - 10/8/74 by multiplying the $157,542 times a factor of the estimated additional purchases for the additional period divided by the total purchases for the larger period.

4. Under method number 3, the incentive credit rate of 16.3 per cent of October, 1972, the month before the "cut-off", was averaged with the August, 1974 rate of 12.4 per cent, to arrive at a mean average of 14.4 per cent; the 14.4 per cent multiplied by the Ford parts purchases of $1,122,659 for the period, 11/1/72 - 9/20/74, resulted in a credits allowable total of $161,663 and an estimate of $4,003 was used for the credits, 9/20/74 - 10/8/74.

No addition was made under methods numbered two or three for parts shipped by 10/8/74 but not billed.

5. It should be noted that the above calculations do not give effect to allowable credits on parts purchased after October 8, 1974.

Dated, New York, NY
October 24, 1974

Very truly yours,

David L. Wasser

DAVID L. WASSER

WASSER Ex. 36

FLM COLLISION PARTS, INC.
ALLOCATION OF AUDIT TEST [illegible] OF INCENTIVE CREDITS
TO TOTAL FORD GRADE PARTS PURCHASES OF FLM, 11/1/72-9/30/74

Period (1)
Audited History of Incen. Inc credits
If Ratios Before Cut-Off, 10/1/74-12/31/74:

Wholesale Incentive Credits		$ 96,319.36	
Purchases, Ford Parts		548,123.87	
Credits/ Purchases		17.2%	
Rate, August, 1974 (Lintos, etc., excluded)			
Credits	$11,108.36		
Purchases	90,859.41		
Credits/ Purchases		12.4%	
Average of Beginning and End		14.8% x	
	$1,122,659 Purchases	=	$166,154
Additional to Date, .148 x 322,820		=	4,517
9/30/74 - 10/8/74			170,671
10/9/74 - 1/31/75 .148 x 156,147 (approx.)			22,110
Method (2)		Total	193,781
Incentive Credits, Test Period, Other Sheet $41,439.54 x 100 / 26.3 = Test Percentage		=	157,542
Additional to Date .025* x $157,541			3,939
9/30/74 - 10/8/74			161,481
10/9/74 - 1/31/75 .139 x 157,541			21,898
Method (3)		Total	183,379

	%
Atlas, October 1972 Incent. Cr./Purchases	16.3
August, 1974 Rate	12.4
	28.7

Average 14.4% x
$1,122,659 = 161,663

Additional to Date, .144 x 322,820	=	4,003
9/30/74 - 10/8/74		165,666
10/9/74 - 1/31/75 .144 x 156,147		22,485
* Purchases, 9/30/74 - 10/8/74 = 322,820	= .025	188,151
" , 11/1/72-9/30/74 = 1,122,659		

** " 10/9/74-1/31/75 156,147 / 1,122,659 = .139
" 11/1/72-9/30/74

Summary of Test Folders of Ford Crash Parts, Including Parts Purchased at Ford Dealers and Dealer Wholesale Incentive Credits,
Nov. 1, 1973 - Sep. 20, 1974

Price Book Period	Folder No.	Wholesale Incentive Cr.	Ford Parts Purchases
October 31, 1972-Jan. 30, 1973	1	$ 843.31	$ 5,091.47
" "	2	846.14	6,204.63
" "	3	117.12	840.05
" "	4	6,740.06	46,849.61
" "	5	1,402.44	7,980.95
" "	6	5,057.77	37,153.82
" "	7	2,500.63	12,577.66
" "	8	3,748.27	22,715.67
January 31, 1973-Feb. 19, 1973	12	945.53	8,082.52
" "	18	593.72	4,299.43
February 20, 1973-April 20, 1973	9	7,532.19	52,071.44
Mid May, 1974 -Jun[illegible], 1974	13	2,580.66	21,674.61
June 1, 1974-July 31, 1974	10	4,451.47	36,577.98
" "	11	182.51	1,071.39
Aug. 1, 1974 -Aug. 31, 1974	14	42.47	325.76
" "	15	1,182.96	9,680.64
" "	16	422.79	3,342.93
" "	17	2,245.50	16,184.10
		41,439.54	294,730.76

Total of Test Folders 294,730.76

Total FLM Purchases of Ford Crash Parts, 11/1/72-9/20/74 1,122,[illegible]58.11

Purchases Tested/Total Purchases [illegible]6.3%

Calculated Incentive Credits for Entire Period: 41,439.54 × 100/26.3 = 157,[illegible]

Additional Purchases 9/20/74 - 10/9/74 [illegible]

10/9/74 - 11/30/[illegible]

Transcript of Post-Trial Conference, January 16, 1975

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

- - - - - - - - - - - - - - - - - - X

73 Civil 713

January 16, 1975
4:30 p.m.

Before:

HON. THOMAS P. GRIESA,

District Judge.

APPEARANCES:

JULIEN & SCHLESINGER, ESQS.,
Attorneys for Plaintiff
By: STUART S. SCHLESINGER, ESQ.
DAVID JOROS, ESQ.,
DAVID WASSER, ESQ.,
of counsel.

SULLIVAN & CROMWELL, ESQS.,
Attorneys for Defendants
By: ROBERT MacCRATE, ESQ.,
of counsel.

WILLIAM A. ZOLBERT, ESQ.,
Office of General Counsel,
Ford Motor Company.

- - -

THE COURT: In trying to work up a decision in this case my law clerk and I reached really what we regarded as somewhat of a standstill because of the following circumstances. I have had a number of briefs from the parties prepared before the trial and during trial. As we got more into the legal topics following the trial, we became aware of a great body of authority and problems, really, which were not indicated in the briefs.

We have tried to go forward on our own, but I think the point was reached, at least I am convinced of it, that it would not be fair to me or to the parties here to attempt to write a decision without giving the parties an opportunity to submit further briefs.

The issues which I believe exist here and the applicable authorities go so far beyond what are in the briefs that I really don't want to go off on my own without giving the parties an opportunity to cover the points. I say that, and I want to emphasize I am not saying that critically of any of the attorneys, and I won't try to go into the history of what briefs I requested and what kind of requests along that line I made -- I wouldn't want to get into that -- but the fact is as we stand right now I think that there should be further briefing. I think it is the job of the attorneys.

I did ask at the end of the trial, Mr. MacCrate told me that he had some further points he was preparing briefs on, namely the indirect purchaser problem and damages and relief, and I asked the attorneys if they would submit to me letters descriving any further briefs they wanted to submit and any further testimony. There was a problem about the completeness of the evidence on damages.

If my memory is correct and if our file is correct and complete on the matter, we did receive some correspondence about additional exhibits on damages, but I don't think we received any proposals on further briefs. So let me just outline the problems I think still exist.

I recognize that the trial concluded on October 9, I recognize it is now January 16, but the case was accelerated for trial, and I think in the long run, in view of the almost inevitable appellate procedure that somebody is going to want to go through, I think in the long run we will do better to do the best job we possibly can now, even though it puts off the decision perhaps longer than anybody would have liked.

Let me start with the plaintiff's side. I can go down almost every point and say to you that the briefing needs to be far more sophisticated and complete than anything even approached by what I have so far. This is a sophisticated

antitrust problem. It is unusually sophisticated. It is not treated as such by the plaintiff in any way.

I started with the Robinson-Patman Act because at least on first blush maybe that's the most obviously applicable statute, if there is some statute which confers a right to relief, because there was indeed a difference in prices. Okay, let's start with Section 2(a) of the Robinson-Patman Act.

The first question is a question of standing. That's a very difficult question. One thing that has struck me, and I want both the plaintiff and the defendant to cover this, is the question of whether, even apart from any indirect purchaser doctrine, whether FLM has standing to sue. There is a fair amount of language in cases that Ford has cited to the effect that only a purchaser from the defendant can sue under Section 2(a), but we have looked at those cases, Klein against Lionel, and so forth, and I question whether that is really the law, that proposition that only a purchaser may sue under Section 2(a).

For instance, I think it is Judge Rodney's original opinion in the District Court in Klein against Lionel. He carefully differentiated -- I am not as fresh on that as I should be. Let me approach it this way. In that group of cases, Klein against Lionel and others, the particular

plaintiff who was usually on, say, the second level of distribution, like a retail level, he was claiming that he should have the same price as somebody on the first level, like a wholesaler or a jobber, and he was claiming that he had the right to sue to get that kind of parity.

The problem wasn't so much in reality that he was not a purchaser, but there wasn't any discrimination in the people that the defendant really dealt with. I am not putting this well. I just recommend that you start in your research with Judge Rodney's decision where he very carefully differentiates the different questions of standing. Unfortunately, my mind is hazy on it, but when it came to the Court of Appeals, the Court of Appeals didn't analyze the matter as carefully as Judge Rodney did and they sort of began the trend to this very general language that somebody has to be a purchaser in order to have a cause of action. That's been carried along in cases where it is really dictum, where the problem is like that in Klein against Lionel.

The question in our case is the question which Judge Rodney really reserved, and that is let us suppose that there is discrimination at the primary level between two actual purchasers: can someone who is injured by that have standing to sue? That is our FLM case.

FLM really is complaining about differentiation in

prices charged by Ford to Ford dealers and FLM claims that it is competitively injured because of the discrimination in prices charged to Ford dealers. Does FLM have standing in the event that the Ford dealers will not sue, does FLM have standing to complain about that discrimination?

In my view that question is presented here. In my view it was not presented in any of that lineup of cases involving the Klein against Lionel group of cases. So I think that the plaintiff, if it is going to get into the standing problem in any sophistication had better deal with that. I am trying to deal with it, and I want you to.

That brings us to, as Judge Rodney said in the District Court opinion in the Klein against Lionel case, this is basically a problem under Section 15, under Section 15 USC, Section 15. So what you had better do is to examine the general problem of standing to sue for antitrust violations.

Is the case law broad enough to permit someone who is injured in the way FLM claims to have been injured, is the case law broad enough under section 15 to give FLM standing to sue. None of the questions that I have talked about in the last few minutes have been covered by the plaintiffs.

As for the defense side, they naturally relied on the kind of accepted doctrine of the Klein against Lionel line of cases. I wouldn't expect them to do otherwise. But,

from the plaintiff's point of view and from my point of view, I am not willing to let the matter rest there. In going at your authorities, you have to remember that in the antitrust field it is a field that is where the case law can be confusing, it can seem contradictory, courts will hand down decisions without fully realizing the implications in other areas, and so forth.

So, there is no way to cover a difficult antitrust problem except by looking at all the cases plus the law review articles, the texts, legislative history where it is relevant, and that has got to be done. You have got to canvass the literature. So much for standing.

We come to the indirect purchaser or indirect customer problem. I think that the plaintiff has passed this off far too quickly. The problem here is that Ford really did not want to deal with FLM. They took steps in their revised policy of 1971, the July, 1971 revision, they took steps to eliminate any special benefit which might accrue to FLM.

They have stated in their briefs that as far as they are concerned, FLM is not a welcome part of their distribution system. They say if a Ford dealer wants to sell to FLM and FLM can accord to buy from the Ford dealer at the Ford dealer's normal prices, that's between the dealer and FLM. But, as far as Ford is concerned, FLM is not a desired

or contemplated part of their distribution system.

That is a critical fact in analyzing any concept of indirect purchaser or indirect customer, and you have got to compare it with the -- I mean compare the cases giving effect to the exact facts of this case, not just talking about -- this isn't a matter of just listing a few contacts, the fact they go directly to Teterboro. We don't just add up contacts. It is a somewhat deeper question that that.

Also I think there is the question of how to apply the Fred Meyer case, there is language in the Fred Meyer case, particularly at pages 353 and 354, which may indicate a somewhat broader definition of customer, whether you call it indirect or however you define it, this is something that could possibly be in the plaintiff's favor, so I urge you to examine the Fred Meyer case very closely, see if it expands on the lower court indirect purchaser doctrine or not. There is language that indicates it might.

On the other hand, whether you are talking about the Fred Meyer doctrine or the indirect purchaser doctrine, whether they are two different doctrines or one, the question is whether this is really applicable under Section 2(a).

The Fred Meyer case, and I think these indirect purchaser customer cases basically -- well, I am getting out of my depth here, I don't remember enough to say what I was

about to say -- but the Fred Meyer case was a 2(d) case. The Court said it is perfectly practical to reach down and give these retailers the promotional benefits, allowances, or whatever was involved. But the question is can you really apply that in a two-way case.

If you are indeed considered to be a customer or purchaser under 2(a), isn't the concept one of equality? How can you ever have, even under FLM's contentions, how could you have really equality of pricing between FLM and the Ford dealers, because if the Ford dealers even mark the materials up one-half a percent, there is not equality? So you have got to examine and see whether the indirect purchaser doctrine or the customer concept in Fred Meyer can really apply to a two-way case such as this.

Let's go to the next question, and that is the basic problem which we talked about to some extent during the trial, and that's the problem of the functional levels of distribution. Ford has emphasized that as a defensive point, and Ford's contention is that it is inherent in business distribution systems that different prices have to be charged to people on different levels of distribution, and Ford I think in effect is saying once you can see that, doesn't it follow that Ford can decide whether they are going to have a two-tier or a three-tier system, and Ford can make charges accordingly.

This is one problem where we began to get into the literature and we found that there is a great amount of material that has never really appeared in the briefs. There is legislative history; there was in connection with an amendment to the Robinson-Patman Act; there was consideration given in the Congress to specifically authorizing price differentiations at different levels of distribution. That proposal was not adopted. That may or may not have significance for our case, but it ought to be discussed.

In view of the fact that it is not expressly authorized by the Congress and it is not expressly invalidated in so many terms, how does a Court deal with the question of functional levels of distribution? The Rowe treatise says that it is all to be judged according to its effect on competition. That is, if you have a different price charged to a wholesaler than is charged to the retailer, this will probably stand up not because it is expressly authorized in so many terms by the Robinson-Patman Act, but because there isn't the unlawful effect on competition, the theory being that the wholesaler is not in competition with the retailer.

How do you apply that concept in the present case? I think it is a little tricky, because the Ford dealers who are charged the prices by Ford, they in a sense are not competitively hurt by Ford's present system. Ford charges

exactly the same thing to all its dealers who sell to body shops, so in the competition for the business of body shops in what Ford considers that wholesale function, there is no detriment to the competition among Ford dealers.

If Ford dealers sell to retailers, to retail customers, in their own repair shops, why, again they are all charged the same price for that kind of a sale, so they are not hurt in competition for the business of the retail customer.

If there were more than -- say there was a whole group of FLM's, they wouldn't be competitively hurt in selling to the FLM's because they get charged the same price if they sell to people like FLM. So it is a tricky question to solve, and I think you better think up some solutions, because once you get in to the area of functional distribution, it just does not do to just make the naked allegation there is a different price charged.

There is another thing. I think so much of the plaintiff's original brief was complaining about a difference between the price charged to FLM and the price charged to a Ford dealer. Well, that isn't the answer either.

Let's go back before the wholesale incentive discount. Ford then charged the dealers the same prices for these parts in all cases. If a dealer resold to FLM at a

markup, which it was entitled to do, FLM would, of course, pay a higher price than the Ford dealer. I don't know of any law which would indicate that that would be invalid. The mere difference in price that FLM has to pay versus what the Ford dealer has to pay, I don't know of any law that requires the identity of pricing. So a mere statement that FLM pays more than a Ford dealer doesn't in my mind do much of anything.

You have got to analyze the price differences at the level of the Ford dealers.

Going to Ford's side, as I understand the cases, some of these FTC cases and the Rowe treatise, the functional levels of prices is okay where you charge a lower price to a fellow higher up in the distribution system. That is, you can charge the wholesaler less than the retailer. But some indication of a problem from Ford's viewpoint is that there is also the statement in Rowe, and I think he cites some cases, that you can't do vice versa, namely you can't charge a fellow higher up in the distribution system a higher price than you charged a fellow lower down.

Ford will say that rule doesn't apply here, but what Ford is doing is charging a different price for the same item at the same level of distribution. Let me put it this way. If Ford says that the Ford dealers acting as wholesalers are on the same level, regardless of whether they sell to

FLM, and they are not going to recognize a three-tiered distribution system, let's take Ford's premise that when a Ford dealer is acting as a wholesaler -- I mean, all of those sales are on the same level, the wholesale level. Okay. Ford charges different prices to different dealers at that wholesale level. That is the problem for Ford because there is nothing I know of in any of these cases about functional distribution which allows that.

Not to be repetitious, but, in other words, the cases do apparently allow Ford to charge more if a fellow is acting as a retailer than if he is acting as a wholesaler. Right?

But, let's suppose you are selling to two wholesalers. I don't know of anything that allows you to differentiate between the prices you sell to two wholesalers, even if -- let's suppose that one wholesaler has a middleman underneath him or has some system of his own that he devises for his distribution. I don't know of anything in the law that I have read which permits you to differentiate between prices to the same level of distribution just because somebody at that level has a little different method of distribution and he has another tier underneath him.

If you get the problem, in other words, I think that the scheme that appears from the Rowe test and the cases

he cites is that there is in a way an exception to the price differentiation prohibitions in Section 2(a) where you have got a different price sold, charged, where a lower price is charged to a guy higher up in the distribution chain. I don't see how that exception applies here.

AGain, there are at least two important articles in the Harvard Law Review, there are treatises, there is legislative history, and I want it, I absolutely need the whole area canvassed and presented with every relevant authority.

On the question of Section 1, the plaintiff cites the case which impressed me very much at the beginning of the trial, and that's the Schwinn case, but you can't examine the Schwinn case in a vacuum. If I accepted the plaintiff's proposition which is I think just about this broad, mainly, that every time a producer charges a particular price on condition that the product is sold to a particular customer, if I held that that was invalid under Schwinn, I would be running headon into all the cases which invalidate certain phases of functional distribution.

So, I can't apply -- I can't conceivably apply Schwinn as broadly as the plaintiff suggests, and what you have got to do is to re-examine Schwinn and other cases based on Schwinn and your whole Section 1 problem and see how you can reconcile that in some sensible way with what is indeed legal

under the functional discount theories.

On the Section 2 problem -- well, wait a minute. I'd like to ask you to be also, as long as we are at this, to please be careful about your citation of authorities. It is going to be of very limited help to me to cite a lot of general basic material that doesn't apply. I need the case law zeroed in on our problem.

I must say to Ford that this line of cases which I think they said came after Schwinn, I looked at those with red eyes, and I find nothing helpful in them. I am talking about the brief about the principles of Schwinn.

I have gone down the Checker Motors case, the Carter-Wallace case and the Paddington case. I think I could go through with you in tiresome detail those cases, and I don't think they have anything to do with our case. I just ask you please to scrutinize your cases closely and don't waste everybody's time. If there aren't authorities, just say so, but I think there are a lot more authorities on point than we have dug up.

On Section 2, I am cited by the plaintiff to cases like Eastman Kodak. Again, I think you cited me the Poster Exchange case They are completely unhelpful because they do not bear on the problem we have got which is the situation where an auto manufacturer is naturally selling its own

products, and nobody makes Ford cars except Ford, and nobody is going to make Ford fenders, probably, except Ford. It is a kind of monopoly, but it isn't like the Alcoa monopoly where they had literally 97 percent of all the aluminum in the country at one time, and that kind of thing. There are other motor cars made, and this is one of a number.

Ford sets up a system of franchised dealers, exclusive dealerships. Ford does what it does in this case. How does that involve a Section 2 monopolization problem? In order to get to that point, you have got to see if you have in the record the components of a Section 2 problem, and there is so little in the briefs as it stands I am not sure I can formulate it, but I assume you have got to define the product, I mean you have to define the market involved, both product-wise and geographically, and are Ford crash parts a relevant market; did the activity involved here really constitute a monopolization or an attempt to monopolize or a misuse of monopoly power in the way that was involved in the Eastman case and in that Poster case?

You make a good deal of the refusal to sell. Aside from just being -- whether or not you have the sholesale incentive discount, in the briefs you claim it is wrong, the idea of Ford to refuse to sell. Is that a realistic theory? If you have any kind of exclusive dealerships and it is valid

at all, I can't quite see why it can't be valid with respect to the crash parts, provided they don't violate the pricing laws.

On damages I think I have about a three or four-page brief from the plaintiff, and you have to analyze the record, you have got to see what you have proved. If there are any loose ends in the proof, the record is still open to the extent that you can read the last few pages, and let's get that solved.

I have had some inconclusive correspondence exchanged between the attorneys. I don't know exactly where we stand on that. If you want to offer something else, you can offer it. If Ford objects, they can object and we can resolve it and get the record closed. But I think before you do that you better maybe do a little more work on the law.

Let's take every element that you feel you have proved and you want to recover, and brief each and every element of damages. You have evidence in here about the gross amount of wholesale incentive discounts lost. Can you recover treble that gross amount or don't you have to see what profits you or your client would make on that gross amount?

For instance, do you have to discount for income taxes? Those are rules of law you have to, it seems to me, present. The rules about lost good will, loss of business

value, every tupe of damage. Which of these damages are duplicative? You just have a lot of things down in exhibits, different elements of loss. Are they overlapping or not and what ones can you recover and what ones can't you?

Of course, you are entitled to, this would come late in the game, but if you recover you have this matter of attorneys' fees and costs, and you need to decide how to deal with that. I assume, if you win the case and we are assessing attorneys' fees and costs, why, we would get affidavits or proof about the extent of the work. So that I wouldn't bother with right now.

Let me just ask you, are you equipped to get at this right now? This is a big problem. This is a very sophisticated antitrust case and there is no way to get around it. If you win, I have got a request in here for a three-quarters of a million dollars in attorneys fees.

MR. SCHLESINGER: We are going to spend it.

THE COURT: I tell you right now that I am not going to give anything approaching that amount unless I have some briefs from the plaintiff's attorneys that mean something.

MR. SCHLESINGER: We are certainly equipped to handle it, your Honor, and timewise is the problem, of course. We have the manpower. It is just a question of reorganizing a little bit and doing it. What schedule are you looking

towards?

THE COURT: I want to receive it as quickly as -- I am ready for it right now. I have gone as far as I can go. You are the plaintiff and you know the problems, the financial problems --

MR. SCHLESINGER: That is why speed is so terribly important.

THE COURT: I am sure it is.

MR. SCHLESINGER: Realistically, your Honor, I would think we are in the middle of January, by the first week in February.

THE COURT: You think you can do this in three weeks?

MR. SCHLESINGER: Yes. If it is a question as we get down the road, it is a few days here or a week, I am sure I can come to the Court or counsel and say --

THE COURT: I want the job done. A week doesn't make that much difference. Let's tentatively set the 7th, Friday the 7th of February.

MR. SCHLESINGER: While I am on my feet, your Honor, let me just apologize for Mr. Julien not being here. He is presently trying a case.

THE COURT: I want you to get the transcript and this will be a lot better -- it doesn't make any difference

about his not being here. Ford can go ahead and work on these things now. Can Ford respond in two weeks after you get their brief?

MR. MacCRATE: It is a little difficult sight unseen, your Honor. Could we have until February 28?

THE COURT: All right, February 28. We will give three weeks to everybody.

The main thing is to have it thorough. We will be better off in the long run if we get it out of the way.

(Court adjourned.)

Memorandum to Counsel from Judge Griesa,
January 17, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, NEW YORK 10007

THOMAS P. GRIESA
DISTRICT JUDGE

January 17, 1975

MEMORANDUM TO COUNSEL

FLM COLLISION PARTS, INC. v. FORD MOTOR CO. (73 Civ. 713)

In connection with the further briefing on the law, I would like to add three points to those mentioned yesterday at the hearing.

1. In connection with the standing question under Robinson-Patman § 2(a), please consider the significance of the language -- "where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . ." What effect does this language have on the question of the standing of a party such as FLM? There may be legislative history on the point. There may be some significance in the discussion of competitive injury contained at the top of 390 U.S. at 357 (the Fred Meyer decision).

2. In connection with FLM's claim under Robinson-Patman, it is necessary to keep in mind that FLM is complaining about competitive injury vis-a-vis the level of distribution above FLM. In other words, if we consider the Ford dealers as the first line of distribution, and FLM as a second line of distribution, we have a party in the second line complaining of a competitive disadvantage as between it and parties in the first line. Is such an injury within the cognizance of Robinson-Patman § 2(a)? In this connection, we have the Fred Meyer case, which says that in a § 2(d) situation, the intent of the provision is basically to impose proportional equality "only where buyers competed on the same functional level." (390 U.S. at 356). But there is also the passage in Fred Meyer at p. 357 of the opinion (referred to above) where there is an indication that competitive injury may have a broader meaning under § 2(a).

3. Is there a problem in this case about the magnitude of the competitive injury? Does an injury to FLM's business satisfy the language of Robinson-Patman § 2(a) -- "substantially to lessen competition"? Are there similar problems under the other antitrust statutes referred to?

Thomas P. Griesa

Thomas P. Griesa

Plaintiff's Post-Trial Brief, February 24, 1975

 Wasa Ex 37

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.
----------x

73 Civil 713

(TPG)

PLAINTIFF'S POST-TRIAL BRIEF

STATEMENT OF FACTS

The plaintiff FLM Collision Parts, Inc. (FLM) is a New York Corporation founded in 1965. Since that time it has been engaged in the business of selling Ford, Lincoln and Mercury (Ford) 'crash parts' to service stations and body shops in the greater New York area. (Pre-trial order P1-2)

Crash parts are those parts, mostly sheet metal, which are used to repair a vehicle after a collision. Ford crash parts are subject to patents and are manufactured solely by the defendant Ford Motor Company or its licensees, and distributed by the defendant Ford Marketing Corporation

(hereinafter collectively referred to as defendant, Ford, unless otherwise stated) (Pre-trial order P 4, 7-9).

The defendant Ford sells crash parts only to franchised Ford dealers. (Pre-trial order P 10) All persons wishing to obtain Ford crash parts necessarily have to obtain them through a franchised Ford dealer. Franchised Ford dealers in addition to selling crash parts to service stations and body shops use crash parts for repairs in their own repair shops. Franchised Ford dealers do not act as agents of Ford in selling crash parts but purchase crash parts outright from Ford. Once a Ford dealer obtains the crash parts from Ford, all title and risk as to those parts is borne solely by the dealer. (Pre-trial order P 29; Tr. 569)*

Since 1965 the plaintiff has been purchasing Ford crash parts from franchised Ford dealers at a small percentage, between 2 and 5 percent (Tr. 144) above the dealer's cost for those parts and would then resell those parts to various independent body shops and service stations.

* Tr. refers to the trial transcript and the number following to the page in the transcript.

Each dealer is assigned a code number under which it is invoiced by the defendant Ford. Initially, the plaintiff purchased parts under an agreement with Central Lincoln-Mercury's (Central) and used Central's code number.

At Central's request, a separate code number was assigned to the plaintiff's purchases. (Ex. 10) The plaintiff's business expanded from a volume of $81,670.00 in 1965 to $793,947.00 in 1973. (Pre-trial order P 30)

Sometime prior to November, 1968, the Federal Trade Commission advised Ford that the Commission considered Ford's method of distributing crash parts an unfair method of competition since independent body shops who were competing with franchised Ford dealers for the consumer's repair business had to purchase their crash parts from the franchised Ford dealer and were, therefore, put in a poor competitive position. The Commission advised Ford that it should institute a new method of distributing its crash parts so that independent body shops could compete with franchised Ford dealers for repairs. The Commission recommended to Ford that Ford sell crash parts directly to body shops and to independent wholesalers of crash parts or find some other method which would permit independent body shops to compete

with franchised Ford dealers for repair business. In an attempt to avoid a competitive after market in the wholesaling of Ford crash parts which would develop if Ford sold crash parts to independent wholesalers, Ford instead offered a wholesale incentive to its franchised dealers for all crash parts which they resold and did not use in their own repair operation. (Ex. 9)

In November, 1968, the defendant granted the aforesaid wholesale incentive allowance to its dealers. (Pre-trial order ¶ 18) Not all parts were eligible for the allowance, but on those crash parts which were eligible, the allowance was 25% off the dealer cost. (Tr. 35)

After November 1, 1968, Central would pass on the entire 25% allowance to the plaintiff. (Tr. 118) The plaintiff would pay Central 3% over its cost for the parts in question. FLM would receive from Central all other discounts which Central received from the defendant. (Pre-trial order ¶ 16; Tr. 142-161)

Franchised Ford dealers were not given the wholesale incentive allowance on parts used by them in their own repair operations, or when they sold crash parts to another franchised Ford dealer. (Pre-Trial order ¶ 19)

Between 1963 and 1971 Ford was aware that FLM was acting as an independent wholesaler for Ford crash parts. (Tr. 39, 595) On two occasions in 1969 and 1970 Ford audited FLM's books and records. (Tr. 21,32) On both occasions, the audit was a 'clean' one. Ford's auditors found that FLM had not acted in any way to thwart Ford's distribution or discount policies. (Tr. 28)

Prior to July 1, 1971, Ford had received complaints from franchised Ford dealers that FLM was competing as an independent wholesaler in the sale of Ford crash parts. (Tr. 71) The competitive position of franchised Ford dealers in the area where FLM was acting as an independent wholesaler in direct competition with such franchised dealers was considered important by the defendants. (Ex. 17)*

The defendants, with full knowledge that FLM was competing with franchised Ford dealers, (Tr. 595), that FLM was the only independent wholesaler doing a volume business in crash parts (Tr. 61, 513, 666), also knowing that Central passed along its entire wholesale incentive discount to FLM

* Some of the franchised Ford dealers with whom the plaintiff was competing for the sale of crash parts were completely or partially owned by the defendant Ford. (Tr. 102)

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(Tr. 61), and having FLM specifically in mind, (Tr. 509,624) Ford, effective July 1, 1971, changed its wholesale incentive plan so that franchised Ford dealers would no longer receive a wholesale incentive on crash parts which they sold to FLM. Franchised dealers would only receive the wholesale incentive on sales directly to independent service stations and body shops. (Pre-Trial P 20)

The defendant made this change in its wholesale incentive plan with full knowledge that it would place the plaintiff in a 'poor competitive position' as a wholesaler of Ford crash parts. (Tr. 669) If this were not enough to put the plaintiff out of business or at least prevent it from operating profitably, in October, 1972, the defendant directed Atlas Lincoln-Mercury (Central's successor) to stop selling crash parts to the plaintiff (Tr. 168, 175; Ex. 32) and attempted to and did prevent other franchised Ford dealers from dealing with the plaintiff. (Ex. 32)

Although the defendants deny this, the evidence supports the plaintiff's position. Aside from the explicit statements contained in Ex. 32, prior to November, 1972, the plaintiff had been considered a valuable account of Central

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and later Atlas (Ex. 32) and immediately subsequent to November, 1972, Atlas suddenly refused to do business with the plaintiff. Similarly, Thomas Motors Inc., another franchised Ford dealer who had solicited the plaintiff's business only a few weeks earlier refused to do business with the plaintiff. (Tr. 273)

The defendant's attempt to explain their efforts directed at putting the plaintiff out of business and preventing the plaintiff from competing with franchised Ford dealers, by claiming that the change in the wholesale incentive policy was not directed at putting the plaintiff out of business, although it would necessarily have that effect, (Tr. 669) but that if the plaintiff remained in business, it could conceivably act as a conduit whereby one franchised dealer could sell parts to FLM, receive a 25% wholesale incentive allowance, FLM would then resell the same parts to the same or another franchised Ford dealer who would again, claim the 25% wholesale incentive allowance when the second dealer resold the very same parts, or the second franchised dealer would use these crash parts in its own repair operations and thwart the defendant's policy of not giving a wholesale incentive to franchised dealers on

crash parts used by them in their own repair shops. (Tr. 495, 510, 557)

Admittedly, FLM had not acted as a conduit for crash parts between Ford dealers and had had a 'clean' audit by Ford in 1969 and 1970. (Tr. 28, 570)

It is the defendant's position that they have a right, by controlling the price which its franchised dealers charge the plaintiff for crash parts, to prevent the plaintiff from operating a legitimate business simply in order to make it easier for the defendants to ascertain if its own franchised dealers are attempting to obtain excessive discounts from it.

The defendants, by charging franchised Ford dealers 25% more for the same crash parts if those parts are sold to FLM by the dealer, and which 25% additional charge is passed on to FLM by the dealer, constitutes a price discrimination in violation of the Robinson-Patman Act. (15 U.S.C. 13 (a)).

Ford's wholesale incentive policy since July 1, 1971 which charges franchised dealers 25% more on crash parts which they resell to FLM constitutes an unreasonable restraint of trade in violation of §1 of the Sherman Act, (15 U.S.C. 1) - pursuant to the Schwinn Doctrine, (U.S. v. Arnold, Schwinn & Co., 383 U.S. 365 (1967)

The defendant's direction to certain of its dealers not to deal with FLM constitutes a conspiracy in restraint of trade and is likewise in violation of §1 of the Sherman Act.

The defendant's attempt to monopolize and their monopolization of the after-market in Ford crash parts by using its power as the sole manufacturer of those parts to prevent anyone other than franchised Ford dealers from competing in the wholesaling of those parts is in violation of §2 of the Sherman Act. (15 U.S.C. 2)

The plaintiff having been injured in its business and property by the defendant's violation of the antitrust laws is entitled to recover treble damages from the defendants including the costs of this action and a reasonable attorneys' fee. (15 U.S.C. 15)

POINT I

THE PLAINTIFF IS ENTITLED TO RECOVER FOR THE DAMAGES CAUSED TO IT BY THE DEFENDANT'S VIOLATION OF THE ROBINSON-PATMAN ACT 15 U.S.C.13(a).

15 U.S.C. 13(a) in pertinent part provides as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. (emphasis added)

Section 2(a) of the Act prohibits a seller from discriminating in price between different purchasers of commodities of a like grade and quality. "(A) price discrimination . . . is merely a price difference." FTC v. Anheuser-Busch, Inc. 363 U.S. 536 (1960)

In our case, there is no dispute that the defendant charges franchised Ford dealers different prices for the very same crash parts depending solely upon whether or not the franchised dealers resell those crash parts to the plaintiff or resell them to independent body shops and service stations.

To state that there is no price discrimination between franchised Ford dealers because all franchised Ford dealers are charged the same price by the defendant dependent upon whom they resell the crash parts to is a non-sequitur and fails to take into consideration the purposes behind the Act and the clause in subdivision (a) of the Act which refers to "customers of either of them."

The purpose behind the Robinson-Patman Act was to prevent the chain stores which were expanding greatly during the 1920s and 1930s from driving the small merchant out of business. The chains, due to their great purchasing power, were able to demand price concessions from suppliers and able to resell at prices against which small merchants could not compete. (See generally, Rowe: Price Discrimination Under the Robinson-Patman Act chapter 1 (1962)); Rowe, "the Evolution of the Robinson-Patman Act: A Twenty Year Prospective," 57 Col. L.Rev. 1059, 62 (1957)

The purpose of the Robinson-Patman Act was "for preservation of equal opportunity to all" (S. Rep. No. 1502, 74 Cong. Second Sess. 3 (1936)), and to make certain that

all purchasers received the same price from suppliers, except to the extent that the price difference between various purchasers was 'cost justified' -- (i.e.) the extent to which a supplier saved shipping, packing or similar expenses by selling larger quantities to one purchaser than to another.*

* Congressman Utterback in reporting to the House on the Robinson-Patman bill stated what the Act intended when it spoke of the cost justification of price differentials.

"But the bill does not permit price differentials merely because the quantities purchased are different, or merely because the methods of selling or delivery are different, or merely because the seasons of the year in which they enable production are different. There must be a difference in cost shown as between the customers involved in the discrimination, and that difference must be one "resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." A customer granted the benefit of a discrimination may receive it only on the basis of the difference between his methods or quantities of purchase and delivery and those of other customers not receiving the differential.

The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken." 80 Cong. Rec. 9417 (1936) (emphasis added)

If the argument is accepted that there is no price discrimination between franchised Ford dealers who are charged different prices depending upon whom they resell to, the Robinson-Patman Act would become useless. A supplier who wished to give a chain store a lower price than that charged to other purchasers and which price was not cost justified, would merely have to act through a wholesaler rather than sell directly to the chain store. By doing so, it would completely insulate itself from any liability arising from a violation of the Act. It could simply charge its dealers a greatly varied price, not cost justified, depending upon whom they resold to, e.g., charging a wholesaler fifty cents for an item if the wholesaler resold that item to a chain store and one dollar for the very same item if it were resold to anyone else.

According to this interpretation, the supplier would not be violating the Robinson-Patman Act so long as it was charging all wholesalers the same price depending upon whom they resold to. To read the Act this way is to make it a nullity and "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an

additional link to the distribution chain."
Perkins v. Standard Oil Company of California, 395 U.S. 642, 647 (1969). The court in Perkins went on to say "We find no basis in the language or purpose of the Act for immunizing ... price discriminations simply because the product in question passed through an additional formal exchange ...." Perkins, supra at 648.*

It is one thing for a supplier to sell to all purchasers at the same price without regard as to whether they are retailers or wholesalers. This is permitted under the Act. See Bird & Son, Inc., 25 F.T.C. 548 (1937); Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956) In that situation, there is no price difference. It is quite another thing for a supplier to charge different prices so that there is a price difference to purchasers for the same item, when

* The author of a note in the New York Law Forum in 1966 before Perkins had been decided -- 12 N.Y.L.F. 91 (1966) takes the same position that the court took in Perkins and points out that if a supplier could insulate himself from liability simply by adding an additional link in the distributive chain, it would make a mockery of the Act. at 99 See especially, n.42.

those prices are not cost justified, with the different prices based solely upon the supplier's arbitrary determination that its customers should be charged less if they resell to favored persons and more if they resell to others. Arbitrary classifications of purchasers by a supplier do not permit him to charge different prices to customers for goods of the same grade and quality. See Golf Ball Mfrs. Assoc. 26 F.T.C. 824 (1938).

The defendants discriminate in price between the various franchised Ford dealers depending solely upon the arbitrary classification by the defendants of whom the dealers resell to. The defendants charge the dealer more if he resells to the plaintiff who is higher up on the distribution scheme then if the dealer sells to a body shop who is on a lower distributive level. The plaintiff purchases crash parts from franchised Ford dealers on a cost-plus basis (i.e. the plaintiff pays the franchised Ford dealer the dealer's cost for the part plus a small markup), and is being severely injured by the defendant's discriminatory pricing policies.

The defendants, take the position that even if it is found that they do discriminate in price, the plaintiff has no standing and cannot recover under the Robinson-Patman Act since the plaintiff itself did not purchase crash parts directly from the defendants and only a purchaser who purchases directly from a supplier at a discriminatory price may recover.

Defendants rely upon such cases as Klein v. Lionel, 237 F.2d 13 (3d Cir. 1956) for the proposition that only a person who purchased directly from a defendant at a discriminatory price has standing to sue under the Robinson-Patman Act. Klein does not stand for that proposition.

In Klein, the plaintiff was a retailer who purchased Lionel electric trains through a wholesaler. The defendant, Lionel would sell to chain stores and to wholesalers at the same price, a discount of 52% off the list price. Klein took the position that since the defendant would not deal with him directly and since the wholesaler would necessarily make a profit in selling any Lionel products to the plaintiff, the plaintiff was paying a higher price and was unable to compete with chain stores who were paying the exact same price as the plaintiff's wholesaler was to the defendant Lionel.

The court granted summary judgment to the defendants, simply because before a violation of the Robinson-Patman Act could be found, there had to be a discrimination or difference in price between two purchasers. In Klein, there had been no such difference in price since the chain store and the wholesaler both of whom were buying from the defendant supplier were paying exactly the same price.

The District Court in rendering its decision in Klein, 138 F. Supp. 560, 564 (1956), specifically reserved the question as to whether or not a retailer who was injured and who was not a purchaser directly from the manufacturer would have a right of action against the manufacturer who discriminated in price against the wholesaler from whom the retailer was purchasing the manufacturer's products.

A retailer who is injured in his business by the manufacturer's price discrimination against his wholesaler, may bring an action against the manufacturer who was guilty of the initial discrimination against the wholesaler from whom the retailer is obtaining the supplier's goods.

Subdivision (a) of the Act specifically provides that it shall be unlawful to discriminate in price where the discrimination may tend to injure or prevent competition with any person who grants or receives the benefits of such a discrimination 'or with customers of either of them.'

Congress in enacting subdivision (a) of the Act specifically included the phrase 'customers of either of them' and had a purpose behind doing so. The Act prohibits a supplier from discriminating in price where the effect of such a price discrimination would affect the ability to compete of customers from the supplier's direct purchasers. See FTC v. Morton Salt Co., 334 U.S. 37, 55 (1948).

To adopt the position that although Congress made it illegal to discriminate in price where it affects the ability of customers of the supplier's purchasers to compete, yet if such an illegal price discrimination did take place, the customers from the supplier's purchasers would have no standing to sue, is inconsistent. Congress, in promulgating the Act could not have intended to provide a right without a remedy. In those situations, where the Act does not spell out precisely what Congress intended, we cannot "construe the Act in a manner which runs counter to the broad goals

which Congress intended to effectuate." FTC v. Fred Meyer, Inc. 390 U.S. 341, 349 (1968).

After Fred Meyer, there can be no question that under subdivision (d) of the Act which deals with promotional allowances, a retailer who is not a direct customer of a supplier, but who purchases a supplier's product from a wholesaler and who competes with retailers who purchased directly from the supplier, may bring an action against the supplier if he is not granted the same promotional allowances which the seller grants to the direct purchasing retailer.

Subdivision (d) of the Act does not contain the expansive all encompassing language used in subdivision (a). Subdivision (d) refers only to 'customers', while subdivision (a) refers to 'customers of either of them'.

Nevertheless, the term customers in Subdivision (d) has been construed to mean all those persons, whether technically 'customers' or not whom the Act was supposed to protect. Fred Meyer, supra at 352.

If any doubt remained after Fred Meyer, as to the standing of a party, who is not a direct purchaser from the price discriminator, to bring an action under subdivision (a) as well as under subdivision (d) of the Act, that doubt was laid to rest by the Court in Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969). Perkins was a case brought pursuant to subdivision (a) of the Act.

The court in Perkins stated in no uncertain terms:

> In FTC v. Fred Meyer, Inc., 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed. 2d 1222 (1968), we held that a retailer who buys through a wholesaler could be considered a "customer" of the original supplier within the meaning of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act, a section dealing with discrimination in promotional allowances which is closely analogous to §2(a) involved in this case. In Meyer, the Court stated that to read "customer" narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act. Similarly, to read "customer" more narrowly in this section than we did in the section involved in Meyer would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain. (emphasis added) at 647

See also American News Company v. FTC, 300 F.2d 104, 109 (2d Cir. 1962) for the proposition that the meaning of 'purchaser' in subdivision (a) and 'customer' in subdivision (d) of the Act are consistent.

The question which was reserved by Judge Rodney on the District Court level in Klein has now been clearly answered by the Court's decisions in Fred Meyer and Perkins.

A retailer who is not a direct purchaser of a manufacturer may bring an action against the manufacturer under subdivision (a) of the Act, if the manufacturer has discriminated in price against the wholesaler from whom the

retailer is purchasing the manufacturer's goods and the retailer is injured by that price discrimination.

Even prior to Fred Meyer and Perkins, making clear that a retailer who had been injured by a supplier charging discriminatory prices to a wholesaler from whom the retailer purchased, could bring an action against the supplier, the commentators had adopted that position. In commenting on Klein, supra, they made it clear that the plaintiff in Klein did have standing to sue and the complaint would not have been dismissed if there had been a price discrimination in the supplier's sales to the wholesaler from whom the retailer obtained the product in question.

In a 1965 article in the Utah Law Review entitled "Price Discrimination - Functional Discounts: "Equal Opportunity to All?", 9 Utah L. Rev. 626 (1965), the author states:

> In cases such as Klein, one should be careful to avoid the mistake of thinking of the dismissal as one based on lack of standing. That was not the case. The plaintiff clearly had sufficient interest to sue had he been able to establish a prima facie case of price discrimination. Section 4 of the Clayton Act, providing for private suits, directs that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court ... at 645.

A note in the Yale Law Journal to the same effect states that no policy reasons appear for limiting suits to persons who purchase directly from the price discriminator. "Manufacturer's Responsibility For Price Under Section 2(a) of Robinson-Patman: Are Some Retailers More Equal Than Others?" 67 Yale L.J. 1246, 1254 n.29 (1958); See also 70 Harv. L.Rev. 387, 390 (1956).

Section 2(a) of the Robinson-Patman Act was added on June 19, 1936, 49 Stat. 1526 as an amendment to the Clayton Act and as such became a part of the antitrust laws of the United States.

Section 4 of the Clayton Act, 15 U.S.C. 15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The plaintiff was clearly injured by the defendants' charging its franchised dealers 25% more on crash parts which they resold to the plaintiff and has standing to sue under 15 U.S.C. 15.

The plaintiff, in this case, is the only party who has been injured by the defendants' discriminatory pricing policy. The franchised Ford dealers with whom the plaintiff dealt were all operating on a cost-plus basis. The franchised Ford dealers would sell crash parts to the plaintiff based upon their cost plus a small markup ranging from 2 to 5%. When the defendant charges the franchised Ford dealers 25% more for crash parts which the dealers resell to the plaintiff, the franchised dealers suffer no injury at all. The dealer passes on the entire discrimination in price to the plaintiff, it is only the plaintiff who is injured by the defendants' discriminatory pricing system.

The Court in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 stated:

> We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of §4. at 489

The Court in Hanover made it clear that where a supplier is selling to a customer on a cost-plus basis, it is only the customer who is injured by the inflated prices which occur because of the antitrust violations, and it is the

customer who can bring an action for the damages he has suffered because of those violations. The supplier who is selling on a cost-plus basis, in this case the franchised Ford dealer would have no cause of action since he is passing on the entire over-charge caused by the antitrust violation and has suffered no damages.

Standing to sue for a violation of the antitrust laws is set forth in §4 of the Clayton Act, 15 U.S.C. 15 and states that any person who has been injured by a violation of the antitrust laws may bring an action to recover for any injuries which he may have suffered.

In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S.219, 63 S.Ct. 996, the Court said:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. at 236

See generally "Standing to Sue for Treble Damages, Under §4 of the Clayton Act"64 Col. L.Rev. 570 (1964).

The plaintiff has standing to sue under §4 of the Clayton Act if the claimed losses or injury fall "within that area of the economy which is in danger by a breakdown of competitive conditions in a particular industry." In re: Multi-District Vehicle Air Pollution M.D., L.No.31 481 F.2d 122,129 (9th Cir. 1973).

The court in In Re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir., 1973) stated: "We have previously refused to defeat a cause of action for antitrust violations, merely because the violator chose to deal through intermediaries." at 199. See also Michelman v. Clark-Schwebel Fiber Glass Corp., 1974 Trade Cas. ₱ 74,974 (S.D.N.Y. March 14, 1974).

The courts have taken the position that even consumers who are removed from the manufacturer by many intermediate levels, have standing to sue so long as they were the ultimate victim of the antitrust law violations involved and they can show that part of the increased cost which was brought about by the defendants' violation of the antitrust laws has caused them a financial loss. See Boshes v. General Motors Corporation, 59 F.R.D. 589 (N.D., Ill. 1973); "A Re-examination of Standing to Sue Under §4 of the Clayton Act," 23 DePaul L.Rev. 1332 (1974); "The Effect of Hanover Shoe On The Offensive Use of The Passing-On Doctrine," 46 S.Cal.L.

Rev. 98 (1972).

POINT II

THE DEFENDANT'S DISCRIMINATORY PRICING SCHEME SUBSTANTIALLY AFFECTED COMPETITION WITHIN THE MEANING OF SUBDIVISION (a) OF THE ROBINSON-PATMAN ACT.

Subdivision (a) of the Robinson-Patman Act prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."

What constitutes injury to competition under Subdivision (a) of the Act, has been defined by the court in FTC v. Morton Salt Co., 334 U.S. 37, 49 (1948) as "injury to the competitior victimized by the discrimination."

Prior to the Robinson-Patman amendment to the Clayton Act, the Clayton Act had required general injury to competitive conditions in the line of commerce concerned. The Robinson-Patman Act attempted to expand the doctrine of injury to competition by requiring only a showing of an injury to the

competitor victimized by the discrimination. See Report ot the House on the Robinson-Patman bill by Congressman Utterback, 80 Cong. Rec. 9417 (1936). In explaining this portion of the Robinson-Patman Act, the Senate Judiciary Committee in flowery language stated:

> "This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." S.Rep.No.1502, 74th Cong., 2d Sess.4. (Emphasis added)

In an article in the Harvard Law Review "Effective Competition and the Antitrust Laws," 61 Harv. L.Rev. 1289 (1948), Professor Adelman similarly takes the position that since the Robinson-Patman Act was directed at amending the Clayton Act's requirement of a general effect on competition, it substituted the test of an effect on one or more competitors

as the test of requisite competitive injury under the Robinson-Patman Act. 67 Harv. L.Rev. at 1334.

The clearest case where injury to a competitor at the same time constitutes injury to competition is in a situation such as the instant case, where the plaintiff was the only non-franchised Ford dealer acting as a wholesaler of crash parts (the defendants were aware that the plaintiff was the only independent wholesaler competing for crash parts sales. (Tr. 666) Injury to that single existing competitor so that he will be unable to compete will, at the same time serve as an injury to competition generally in that line of commerce. See e.g. E.B. Muller and Company v. FTC, 142 F.2d 511 (6th Cir. 1944).

In the Second Circuit, proof of a price differential is sufficient to establish a prima facie case of injury to competition, since Congress has shifted the burden of proving the absence of such injury "to any one who sets two prices, and who probably knows why he has done so, and what has been the result." Samuel H. Moss, Inc. v. FTC, 148 F2d 373 (2d Cir., 1945, Cert. denied 326 U.S. 734 (1945). The Supreme Court has cited Moss with approval in both

Automatic Canteen Co. v. FTC, 346 U.S. 61, 79 n.22 (1953); and FTC v. Morton Salt Co., 334 U.S. 37, 45 n.13 (1948).

It has also become established that under the Robinson-Patman Act where the defendant such as the defendants in our case have deliberately set out a discriminatory pricing scheme in order to injure a competitor, proof of anticompetitive intent on the part of a price discriminator is sufficient to establish the injury to competition required by Subdivision (a) of the Act. See Note:"Competitive Injury Under the Robinson-Patman Act", 74 Harv. L.Rev. 1597, 1602-03, 1609 (1961).

Sherman Act cases have likewise taken the position that deliberate injury to a competitor is sufficient injury to competition so as to provide standing to sue under the Sherman Act. In Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the Court stated:

> Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop." at 213.

The defendant's discriminatory pricing scheme has had a substantial effect on the competitive wholesale market in Ford crash parts and has particularly affected the plaintiff who in this case was the competitor victimized by the defendant's discriminatory pricing. The Robinson-Patman Act was enacted to deal precisely with such situations where someone is prevented from fairly competing in the marketplace by a discriminatory pricing scheme.

POINT III

THE DEFENDANT'S DISCRIMINATORY PRICING SCHEME PREVENTED THE PLAINTIFF FROM FUNCTIONING COMPETITIVELY AS A WHOLESALER IN CRASH PARTS.

Although FLM purchased its crash parts from franchised Ford dealers, there is no question that FLM was functioning as a wholesaler of crash parts in direct competition with franchised Ford dealers. (Tr. 39, 61, 84, 669) The fact that the plaintiff had to purchase crash parts from franchised dealers does not mean that it did not or could not compete with them in the wholesaling of such crash parts. Hampton v. Graff Vending Co., 478 F2d 527, 532 (5th Cir. 1973). The controlling element is whether or not resale

competition actually existed between the plaintiff and franchised Ford dealers in the wholesaling of crash parts and if that competition is being interfered with by the defendant's discriminatory pricing scheme. FTC v. Rubberoid, 343 U.S. 470 (1952); see also 16 C.F.R. §15.202 (c).

The plaintiff and franchised Ford dealers were direct competitors functioning as wholesalers of crash parts. Assuming arguendo that franchised Ford dealers were somehow at a higher level of distribution since the plaintiff purchased parts through them(See IP 2, January 17, 1975, memorandum to counsel by the court), this would still not prevent FLM from having standing to bring an action under 2(a) of the Act on the grounds that the defendant's discriminatory pricing system was preventing it from competing as a wholesaler of crash parts. Fred Meyer, supra, a 2(d) case in determining that a 2(d) allowance was only required to be given to persons operating on the same functional level went on to distinguish §2(d) from §2(a) and stated in no uncertain terms:

> We noted in FTC v. Sun Oil Co., 371 U.S. 505, 83 S.Ct. 353, 9 L.Ed.2d 466 (1963), that when Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in §2(a) of the Act by prohibiting price discrimination which may "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."Id., at 514-515, 83 S.Ct. at 364. (emphasis added)

The test is not the label (distributor, jobber or sub-jobber) which is assigned to the plaintiff but rather whether or not the plaintiff is actually competing with franchised Ford dealers in selling crash parts to service stations and body shops.

The small markup of 2 or 3% which the plaintiff paid franchised Ford dealers prior to November 1, 1972 in purchasing crash parts did not prevent the plaintiff from competing as a wholesaler of crash parts. See Hampton, supra, see also Fred Bronner Corp., 57 F.T.C. 771 (1960).

It was the defendant's discriminatory pricing scheme which prevented the plaintiff from competing as a wholesaler of crash parts. The plaintiff has a valid cause of action against the defendants for the defendant's violation of 2(a) of the Robinson-Patman Act.

POINT IV

THE DEFENDANTS CONTROLLED THE CONDITIONS UNDER WHICH THE PLAINTIFF COULD PURCHASE CRASH PARTS AND THE PLAINTIFF WAS AN 'INDIRECT PURCHASER' OF THE DEFENDANT.

In July of 1971, the defendants changed their wholesale incentive so that sales to the plaintiff would no longer receive the 25% wholesale [illegible]tive allowance. This caused the plaintiff to pay 25% more for Ford crash parts and the defendants admit that it made the plaintiff unable to compete as a wholesaler in crash parts. (Tr. 669)

The defendants cannot avoid the Robinson-Patman Act simply by acting through intermediaries, i.e., franchised Ford dealers. It is the defendants who control the terms upon which its franchised dealers can sell crash parts to the plaintiff and by exercising such control, the law considers it as if the defendants were dealing directly with the plaintiff. It was to prevent the manufacturer of a product from following a discriminatory pricing scheme through the use of intermediaries that the 'indirect purchaser' doctrine was first enunciated by the Federal Trade Commission, in Kraft-Phenix Cheese Corp. 25 F.T.C. 537 (1937).

In Kraft-Phenix, the Commission stated:

> A retailer who purchases respondent's goods from jobbers and wholesalers is considered by the Commission to be a "purchaser" within the meaning of the Robinson-Patman Act as well as retailers buying direct. This is because of the fact that respondent recognizes the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them. A retailer is nonetheless a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys." (emphasis added)

The enunciation of the indirect purchaser doctrine was adopted and followed by the courts. See e.g. K.S. Corp. v. Chemstrand Corp., 198 F.Supp. 310 (S.D. N.Y. 1951); American News Co. v. F.T.C., 300 F.2d 104 (2d Cir. 1962); and Purolator Products, Inc. v. F.T.C., 352 F.2d 874 (7th Cir., 1965).

In American News Co., supra, the Second Circuit adopted the indirect purchaser doctrine and stated:

> The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by use of a "dummy" wholesaler.

In Purolator, supra, the court stated:

> If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination.

In Frank G. Shattuck Co., 65 F.T.C. 323, 356 (1967) the Commission stated that in determining whether or not someone should be considered an indirect purchaser, the most important factor to be considered was the degree of control exercised by the manufacturer over the prices and other conditions of the sale made by the wholesaler to the retailer.

In our case, there can be no question that Ford maintained strict control over the dealings of its franchised dealers with the plaintiff. Between 1968 and 1971, while the plaintiff had a separate code number, the defendants twice audited the plaintiff's books and records. (Tr. 21, 32)

Even before the plaintiff had received a separate code number, defendants' employees had solicited orders for the defendant from the plaintiff (Tr. 129); in fact, it was an employee of the defendants' who had introduced the plaintiff to Central and helped establish a relationship between the plaintiff and Central. (Tr. 126) The defendants' employees

visited the plaintiff's premises in 1968 or 1969 and checked on the plaintiff's warehouse facilities and methods of doing business. The defendants' employees advised the plaintiff not to move its location (Tr. 140) and the plaintiff would pick up all of its goods which it purchased from the defendant directly at the warehouse in Teterboro, New Jersey. (Tr. 20, 112)

The defendant maintained a strict control exactly where its products were going and in fact, Ford's defense in this case, is that the reason it did not want the plaintiff to be able to continue its business was so that the defendants would be able to know exactly to whom products were being sold to at each step (Tr. 650)

Not only have there been extensive contacts between the plaintiff and the defendant so that in fact, it was the defendant who was the real party from whom the plaintiff was purchasing crash parts with the franchised Ford dealer acting as a mere conduit from the defendant to the plaintiff, but the defendant maintained a strict control over the prices and terms of sales of crash parts which its franchised dealers made to the plaintiff. When the defendant decided to attempt to

put the plaintiff out of business, they did it by not permitting their franchised dealers to receive the 25% wholesale incentive allowance on sales made to the plaintiff and enforced this policy by compelling its franchised dealers to strictly account for the sale and ultimate destination of each crash part.

It was the defendant who controlled the sale of crash parts by its franchised dealers by exercising control over the price and destination of its crash parts. The defendants were, in effect, dealing with the plaintiff, although technically, a franchised dealer had been placed between the plaintiff and the defendants. However, as the Second Circuit said in American News Co., supra:

> The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by use of a "dummy" wholesaler.

The Supreme Court in Fred Meyer approved the use of the indirect purchaser doctrine in appropriate cases, 390 U.S. at 353.

In a Note: "Robinson-Patman Act- Price Discrimination-Indirect Purchaser Doctrine", 12 N.Y.L.F. 91 (1966), the author commends the use and expansion of the indirect purchaser doctrine stating:

> A broad interpretation of the word "purchaser" would seem justified in light of the remedial purpose of the Act. In order for the prohibitions embodied in the Act to be effective, they must be allowed to pervade the distribution system and root out the evils of price discrimination.

In our case, it is the defendants who are the root of the discriminatory pricing system which is destroying the plaintiff's business, and the plaintiff should be permitted to recover as an indirect purchaser from the defendant for the defendant's discriminatory pricing system.

The defendants claim that since it has made it clear that it does not wish to deal with the plaintiff, the plaintiff should not be considered an indirect purchaser, cannot be sustained.

The way not to deal with someone is to totally remove and absent yourself from any contact with the party with whom you do not wish to deal. It is not as the defendant in this case has done to claim that it does not wish to deal with the plaintiff and at the same time control the terms and

conditions upon which its franchised dealers can deal with the plaintiff. In all indirect purchaser cases, the seller always refused to deal openly, directly with the party being discriminated against. If the defendant did deal directly with the party being discriminated against, there would be no need to have formulated the indirect purchaser doctrine in the first place. The defendant, by controlling the terms and conditions upon which the plaintiff can purchase its crash parts from franchised Ford dealers is responsible for the discriminatory prices being charged on sales to the plaintiff.

POINT V

THE DEFENDANTS CANNOT UNDER THE GUISE OF CALLING THEIR 25% WHOLESALE INCENTIVE ALLOWANCE A 'FUNCTIONAL DISCOUNT' EFFECTUATE A DISCRIMINATORY PRICING SCHEME, INTENDED TO PREVENT THE PLAINTIFF FROM COMPETING AS A WHOLESALER OF CRASH PARTS.

Since July 1, 1971, the defendants have followed their policy of permitting franchised dealers the 25% wholesale incentive allowance if crash parts were sold by the dealers to service stations but not permitting the dealers the same 25% allowance if those very same parts were resold by dealers to the plaintiff.

The defendants attempt to justify this egregious discrimination in price by claiming that the wholesale incentive allowance is a 'functional discount' and that since

the wholesale 'function' is not accomplished unless the wholesaler personally and without any independent intermediaries moves the goods from the wholesale to the retail level, the wholesaler is not entitled to the allowance because he has not performed the wholesale function. (Tr. 495,644)*

* If the defendants' definition of a functional discount is accepted, the functional discount as defined by the defendants becomes a 'specific service' which is rendered by the franchised Ford dealer in connection with the franchised dealer 'handling and sale' of crash parts. Such services come within 2 (d) of the Act which is a strict liability provision with no cost justification permitted. 2(d) requires that the manufacturer provide all persons competing on the same functional level, a proportional allowance for any services which are rendered pursuant to 2(d) of the Act. Fred Meyer made it clear that under 2 (d) the manufacturer must make certain that all persons on the same functional level receive the allowances whether or not they purchase the goods directly from the manufacturer or through a wholesaler. See also FTC Guidelines 16 CFR 740.3; Mueller & Co. v. FTC 323 F.2d 44 (7th Cir. (1963).

If the defendant's wholesale incentive is an allowance situation under 2(d) rather than an outright price discrimination under 2(a) then the plaintiff is clearly entitled to judgment since the defendants, knowing that the plaintiff was competing on the functional level as franchised dealers in the wholesaling of crash parts did not provide the plaintiff with the same 25% wholesale incentive allowance, as it is required to, but instead acted to prevent is dealers from providing the plaintiff with that allowance.

If the defendant's definition of what a 'functional discount' is is accepted, for the purposes of this case, then the plaintiff is entitled to a directed verdict under the Fred Meyer doctrine.

The defendant's definition of a functional discount as requiring the wholesaler to personally without any intermediaries perform the function of moving goods from the wholesale to the retail level, is a novel one totally unsupported and obviously created by the defendants for the purposes of this case in an attempt to justify their discriminatory pricing scheme whose result would necessarily be to prevent the plaintiff from competing as an independent wholesaler of crash parts. (Tr. 668, 669).

With regard to §2(a) of the Robinson-Patman Act, 'functional discounts' have been defined in various ways none of which support the defendant's definition that a 'functional discount' to a wholesaler requires the wholesaler to personally carry out the function of moving the goods from the wholesale to the retail level and if the wholesaler sells the goods to a jobber or sub-jobber who then sells the goods to a retailer, he has not performed the so-called "wholesale function", and is, therefore, not entitled to the wholesaler's functional discount.*

* If the wholesale incentive is actually being paid for the franchised dealer performing a certain function, then it is surprising that the franchised dealer performed exactly the same function of selling crash parts to service stations before the wholesale incentive came into being and that only certain parts which the franchised dealer 'wholesales' receive a wholesale incentive. (Tr. 574)

The reason for the defendant's novel definition of what a functional discount is is that it is the only way the defendants can attempt to explain how it is that under their present wholesale incentive allowance scheme a franchised dealer when reselling crash parts receives a larger discount when it resells crash parts to body shops than when it resells those same parts to the plaintiff who admittedly is a wholesaler or jobber.

All of the text writers and commentators who have defined functional discounts have clearly stated that a functional discount provides for a greater discount to the person higher up on the distribution scheme and for a lesser discount to the person on a lower level.

Rowe in his text - Price Discrimination Under the Robinson-Patman Act (1962), in discussing functional discounts states:

> In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes -- so long as those who are higher up (nearer the supplier) on the distribution ladder pay less than those who are further down (nearer the consumer). at 174. (emphasis added)

The Report of the Attorney General's National Committee To Study The Antitrust Laws (1955) in considering functional discounts, states:

> The typical functional or trade discount system provides for graduated discounts to customers classified according to place in the distribution chain -e.g., the seller's schedule may specify percentage reductions to wholesalers, jobbers, and retailers in diminishing amounts.

Kelley in an article in the California Law Review entitled "Functional Discounts Under the Robinson-Patman Act", 40 Cal. L.Rev. 526 (1952) in discussing trade and functional discounts defines it as . . .

> (A) price differential granted by the seller to a particular buyer dependent on, and because of, the supplier's classification of the buyer at a level of commodity distribution. For example, a wholesaler is allowed a larger discount than a retailer.

The Robinson-Patman Act as it was enacted makes no mention of functional discounts as such. The original bill introduced by Representative Patman (H.R. Rep. No. 2287, 74th Cong. 2d. Sess. 1-2 (1936) contained specific language so as to permit price discounts to purchasers depending upon their function in the distribution process.

The Congressional Conference Committee, without any explanatory comment eliminated all reference to functional or trade discount methods of classifying purchasers and permitting discounts simply because a purchaser was acting on a certain level in the distribution process. (H.R. Rep. No. 2951 2d. Sess. 1,6 (1936). The cases and the commentators have all interpreted the deletion of a specific reference and exemption for functional discounts in the Act as it was finally enacted to mean that functional discounts are to be accorded the same treatment as any other price discrimination situation and is subject to the same defenses of 'cost justification and lack of 'competitive injury'. See: Mueller Co. 60 F.T.C.; 120 (1962) affd. 323 F.2d 44 (7th Cir. 1963);Cert.Denied377 U.S. 923 (1964). The Court in Mueller specifically disavowed the position which the defendant is taking in this case. The Court there said that a distributor's services are not entitled to a price differential when that differential is not cost justified.

Kelley in his article "Functional Discounts Under the Robinson-Patman Act", states:

> The Robinson-Patman amendment now places a cost savings limit on quantity discounts, thus clothing them with the same status as other price differentials. No longer can the characterization of a trade discount as a quantity discount give it a status different from other price differentials.

40 Cal. L.Rev. 526, at 530: also p.543 (1942); for the same proposition see Note: "Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation", 67 Harv. L.Rev. 294, 295 (1953); Note: "Price Discrimination-Functional Discounts: "Equal Opportunity to All"? 9 Utah L. Rev. 626, 628 (1965) Schniderman-"Tyranny of Labels -- A Study of Functional Discounts Under the Robinson-Patman Act", 60 Harv. L.Rev. 571, 586-88 (1947)*

* Schniderman goes through an extensive discussion of what the Congressional intent was in deleting a specific reference to functional discounts in the final version of the Act. (pages 586-88) He concludes that whatever the Congressional intent was, one thing which it did not mean and which it would be a'patent absurdity' to assume was meant, is that under the Act functional discounts which have an effect on competition are to be permitted without there being a cost justification. (67 Harv. L.Rev. at 587 n.58.

Kelly, supra likewise states:

> Both the jobbers in Standard and the dual function distributors in Sherwin Williams possessed bargaining power derived from the character of their purchasing which enabled them to obtain lower prices from suppliers than were accorded single function retailers. The price differentials were functional. Only the Standard order allowed for differentials equal to provable differences in costs of serving retailers and wholesaler-retailers. But the fact that all differentials justified by cost savings are specifically allowed by the Act, emphasizes the order as a prohibition of this type of functional discount per se. (emphasis added) 40 Cal.L.Rev. at 543.

Congressman Utterback in his report to the House on the Robinson-Patman Bill explained what cost justification meant under the Act.

> The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken. (80 Cong. Rec. 9417 (1936)

Admittedly, there was no additional expense to the defendant when a franchised Ford dealer sold crash parts to the plaintiff (Tr. 89) nor was there a cost saving to the defendant when parts were sold to a service station rather than to the plaintiff. In fact, Ford admits that the wholesale incentive allowance was not dependent upon their being any savings at all to Ford (Tr. 73). The plaintiff's purchases of crash parts exceeded the purchases made by most franchised dealers in the New York area.(Tr. 89-90)

Functional discounts are permitted under the Act only where they are cost justified. In our case, there is absolutely no cost justification at all for the defendants giving its dealers an allowance of 25% if crash parts are resold to independent service stations and not granting franchised dealers that same allowance if crash parts are sold to the plaintiff.

There is no cost justification for the defendant to charge 25% more for crash parts sold to the plaintiff. The defendant's discriminatory price which

charges the plaintiff 25% more constitutes a price discrimination under the Robinson-Patman Act.

POINT VI

THE DEFENDANT BY RETAINING CONTROL OVER THE RESALE OF CRASH PARTS ONCE THOSE PARTS HAVE BEEN SOLD TO A FRANCHISED FORD DEALER HAS VIOLATED SECTION 1 OF THE SHERMAN ACT.

The defendant sells crash parts to independent franchised Ford dealers. Once those parts are sold to a dealer, title is transferred to the dealer and risk of loss is with the franchised dealer (Pre-Trial Order 29).

In United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967) the Court stated:

> As the District Court held, where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results. And, as we have held, the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold. Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. White Motor, supra; Dr. Miles, supra. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his

> product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. (at 379)

The Court in Schwinn went on to say:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred-whether by explicit agreement or by silent combination or understanding with his vendee--is a per se violation of §1 of the Sherman Act. (at 382)

The defendant, by charging its franchised dealers 25% more if they resell crash parts to the plaintiff rather than to an independent service station are, in fact, limiting the customers to whom its franchised dealers may sell crash parts. This without more constitutes a per se violation of §1 of the Sherman Act. The defendant need not explicitly prohibit its dealers from dealing with the plaintiff in so many words. If the practical effect of the defendant's action is to control the customers to whom its franchised dealers may sell crash parts once they have taken title to those crash parts, the defendant has violated §1 of the Sherman Act. In enforcing the antitrust laws, the Courts must look at an arrangement as it operates in practice rather than the veneer given to an arrangement by skillful drafting. See Simpson v. Union Oil Co. of Cal., 377 U.S.13

(1964).

If the defendant can charge franchised Ford dealers different prices, depending upon whom they resell to, merely by labeling the price differential a wholesale incentive allowance, the doctrine of per se illegality as set out in Schwinn would be a nullity. A manufacturer could obviate the Schwinn doctrine simply by charging his dealers a greatly varied price depending solely upon whom he resold the goods to. He would not have to say you cannot sell to a certain customer, but would merely charge the dealer so much more if he sold the goods to a customer not favored by the manufacturer that as a practical matter the disfavored customer could not afford to buy the manufacturer's goods if it intended to compete in the resale of those goods. Schwinn cannot be so easily avoided.

The Federal Trade Commission upon being asked to render an advisory opinion concerning a manufacturer's dealings with wholesalers, stated in no uncertain terms:

> The Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him." 16 CFR 15.333

The defendants claim that the reason they discriminate in price against the plaintiff and do not wish to have their dealers sell to the plaintiff is to prevent the plaintiff from acting as a conduit in selling crash parts between franchised Ford dealers.

The Court in Otter Tail Power Co. v. U.S., 410 U.S. 366 cited Schwinn for the proposition that:

> The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct.

Although it may suit the defendant's convenience not to have the plaintiff function as an independent wholesaler of crash parts does not permit them to prevent the plaintiff from operating a legitimate business by controlling through a discriminatory pricing scheme, the customers with whom its franchised dealers may deal.

The doctrine set out by the Court in Schwinn in no way affects a manufacturer from granting legitimate functional discounts to its distributors.

Schwinn does not in any way interfere with a manufacturer granting one level of discount to a distributor, a lower level to a wholesaler and a still lower level to the jobber and retailer. The only affect that Schwinn may have on functional discounts is to prevent a middleman who is performing a dual function from doing so if in order to carry out that dual distribution function, the middleman is required to report to the manufacturer to whom it has resold the manufacturer's goods.

There are certain old cases decided under the Robinson-Patman Act prior to Schwinn which require a supplier who sells to retailers directly as well as to dual function distributors (i.e. wholesalers who also sell at retail) to receive an accounting from the dual function distributor as to exactly what amount of goods was actually sold at the wholesale level. That line of cases represented by the decision in Sherwin-Williams, 36 F.T.C. 25 (1943) require a wholesaler who was also functioning at the same time selling at retail in competition with retailers

who were purchasing directly from the manufacturer to report to the manufacturer precisely what percentage of goods it was selling at wholesale so as to prevent the dual function distributor from receiving a wholesale price for the goods which he sold at retail and thus obtaining a favorable competitive position over those retailers with whom he was competing and who were paying the supplier a retail price for all their purchases.

The Sherwin-Williams decision was followed by the decision in Standard Oil Co. 41 F.T.C. 263 (1945), approved, Standard Oil Co. v. F.T.C. 173 F.2d 210 (7th Cir. 1949), Rev'd on other grounds, 340 U.S. 231 (1951) and although both decisions were prior to Schwinn, they were at that time roundly criticized as being in conflict with the Sherman Act. See Rowe: Price Discrimination Under the Robinson-Patman Act, p.199 et seq.

In our case, since Ford only sells crash parts to one class of suctomers, franchised Ford dealers, there would be no Robinson-Patman violation no matter who the franchised Ford dealers sold crash parts to if the defendant had not formulated a

discriminatory pricing scheme so as to prevent the wholesale incentive being paid on the sale of crash parts to the plaintiff.

However, even in those situations where a supplier did sell directly to retailers at the same time as a dual function distributor who acted as both a wholesaler and a retailer, the law after Schwinn is clear that the supplier cannot control the customers to whom its dealers may sell once those dealers have obtained title and risk to the goods in question. If there is a conflict between the requirements of the Robinson-Patman Act and the broader pruposes of the Sherman Act, the Courts must construe the broad antitrust policies of the Sherman Act rather than be guided by Robinson-Patman requirements. See Automatic Canteen Co. v. F.T.C., 346 U.S. 61, 74 (1953).

Schwinn does not outlaw the functional discount method of distribution nor are Schwinn's prohibitions in conflict with the provisions of the Robinson-Patman Act. The only type of functional discount which is affected by Schwinn is where a supplier is following a dual distribution

system selling to two levels of customers and one of which is operating on both levels. In that case, the supplier would have to arrange his distribution system so that he could comply with Robinson-Patman at the same time without running afoul of Schwinn. If a supplier's distribution system cannot operate without running afoul of either Robinson-Patman or violating Schwinn, then the entire distribution scheme must fall and a new method of distribution which does comply with the antitrust laws be instituted.*

See Albrecht v. Herald Co., 390 U.S. 145, 154 (1967).

Schwinn directly and unequivocally states that the defendants' conduct in this case by controlling the customers to whom its dealers may sell, through a radical price difference, depending upon whom they resell to, is a per se violation of Section 1 of the Sherman Act.

* The defendants claim that it could not permit the plaintiff to receive the wholesale incentive because it could serve as a conduit to transfer crash parts among franchised Ford dealers is frivolous. A franchised dealer who wished to defraud defendants could just as easily work out an arrangement with various service stations whereby they would purportedly purchase the parts for the repairs in their shops and then resell those parts to the franchised dealer.

POINT VII

THE DEFENDANT, FORD MOTOR COMPANY AND FORD MARKETING CORPORATION CONSPIRED BETWEEN THEMSELVES AND WITH FRANCHISED FORD DEALERS TO PREVENT THE PLAINTIFF FROM OBTAINING FORD CRASH PARTS.

The defendants, Ford Motor Company and Ford Marketing Corporation conspired between themselves and with franchised Ford dealers to prevent the plaintiff from obtaining crash parts from franchised dealers.*

Section 1 of the Sherman Act reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

In or about October of 1972, the defendants directed its franchised dealers in the New York area not to deal

* In Rea v. Ford Motor Company, 355 F.Supp. 842,864 (M.D. Pa. 1973) rev'd on other grounds, 497 F.2d 577 (3d Cir., 1974), the Court found that the Ford Motor Company and theFord Marketing Corp. were two separate entitites who could conspire or combine in restraint of trade within the meaning of the Sherman Act. The defendants are collaterally estopped from now contesting that determination which they defended on the merits before the Pennsylvania Court and which was decided adversely to them.

with the plaintiff.

Prior to October, 1972, the plaintiff had been purchasing crash parts from Central Lincoln-Mercury. In late October of 1972, when the plaintiff called Central, it was advised by Mr. Pollack, the dealer principal of Central that he had been told by Rose, Ford's New York District Sales Manager to cease selling crash parts to the plaintiff. (Tr. 169, 175)

Exhibit 32 admittedly written by Rose bears out the plaintiff's contention that the defendants' conspired with its franchised dealers to prevent the plaintiff from obtaining crash parts. (See also Ex.17 referring to the 'feelings' of franchised dealers in the area where FLM is competing for the sale of crash parts.)

There is no longer any question that once the Court finds that the defendants conspired between themselves and with their franchised dealers to prevent the plaintiff from obtaining crash parts, the defendant has committed a per se violation of Section 1 of the Sherman Act. See Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); United States v. Parke Davis & Co.,

362 U.S. 29 (1960); United States v. General Motors, 384 U.S. 127 (1966).

In General Motors, supra the Court stated:

> The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals To Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles.
> at 146*

In our case, the record clearly shows that the defendants directed its franchised Ford dealers not to deal with the plaintiff. Even in the absence of an express direction by the defendants to its franchised dealers or an express agreement between the defendants and its franchised dealers not

* In this case the defendants are making precisely the same argument which was made by the defendants in General Motors, supra and which was disallowed by the Court. There, the defendants attempted to justify their combination to prevent franchised dealers from dealing with certain discount houses by claiming that the 'profit margins' of franchised dealers had to be protected. In our case, the defendants are making exactly the same argument (Tr. 564) and it similarly should be disallowed by the Court.

to deal with the plaintiff in a situation such as ours where there is "joint and collaborative action which was pervasive in the iniation exercised and fulfillment of the plan." General Motors, supra at 142-143; the Sherman Act/of a conspiracy requirement has been met. See also Perma Life Mufflers, Inc. v. International Parts Corp. 392, U.S. 134, 142 (1968).

POINT VIII

THE DEFENDANTS BY EXERCISING THEIR POWER AS THE SOLE MANUFACTURER OF FORD CRASH PARTS ARE MONOPOLIZING THE SALE OF CRASH PARTS ON THE WHOLESALE LEVEL.

Section 2 of the Sherman Act, 15 U.S.C.2 makes it illegal for any person to monopolize, or attempt to monopolize or conspire with any other person to monopolize any part of trade or commerce.

Section 2 does not prohibit a monopoly. A manufacturer may have a natural monopoly over the product which only he manufactures. To monopolize is not simply to possess a monopoly; but it implies some positive drive to seize and exert power in a market. The job of the Courts under Section 2 of the Sherman Act is to isolate and define those elements of positive drive that constitute monopolization. See Neale, The Antitrust Laws of the U.S.A., 93 (1970).

The defendant Ford has a natural monopoly over crash parts which only Ford manufactures. These crash parts are patented and no other company can manufacture crash parts which would be suitable to make repairs on Ford vehicles. Although this in itself may not be illegal, and Ford in the absence of an intent to monopolize, may choose who it will sell crash parts to. A party who has a natural monopoly in the manufacture of a product cannot by illegal means and in restraint of trade attempt to monopolize the after-market in that product once he has parted with title to it.

The Court in Grinnell, 384 U.S. 565 (1966) stated:

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. at 570

The Court in United States v. E.I.DuPont DeNemours & Co., 351 U.S. 377 (1956) stated:

> The Relevant Market. When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. at 394.

There is no question in our case that Ford has a 100% monopoly on crash parts. There is no substitute for Ford crash parts which customers can turn to if they need a part to repair a Ford vehicle. The owner of a Ford automobile which requires repairs must necessarily use Ford crash parts to repair it. See Note: "The Market:" A Concept in Anti-Trust", 54 Col.L.Rev. 582(1954)*

The only remaining question under the rule set out in Grinnel is 'Has the defendant wilfully maintained its market power so as to prevent competition from taking place in the wholesale market for Ford crash parts?

The defendant in this case has through its control of crash parts on the manufacturing level, attempted to gain a monopoly and to control the wholesale after-market in crash parts.

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* In our case the geographic market is not a factor since the defendant is the sole manufacturer of Ford crash parts in the entire United States. If the geographic market did have to be delineated, it would be the metropolitan New York area and its outlying suburbs. The geographic area has been defined "as the area from which buyers ordinarily come in order to deal with a particular seller." See note 54 Col.L. Rev. 582, Section 2, Geographic Market.

The defendant made it clear that it does not want any independents who are not under its control to engage in the sale of Ford crash parts (Tr. 562-564). The defendant has also made it clear that although it has to permit independents to sell products such as batteries and spark plugs which are available from sources other than Ford, it did not wish to have independents selling crash parts since there is no competition in the sale of Ford crash parts because only Ford makes crash parts which can be used to repair Ford vehicles. (Tr. 483)

Ford has made it clear that it does not wish to have persons not under its control deal in crash parts. When the Federal Trade Commission threatened to bring an action against Ford because of its method of distributing crash parts constituted an unfair method of competition since independent service stations could not properly compete with franchised Ford dealers for repair jobs. Ford rather than accepting the Commission's first suggestion that it sell crash parts directly to independent body shops and wholesalers (Ex.9 - Letter of September 16, 1969) instead adopted the wholesale incentive plan so as to make its peace with the Federal Trade Commission and at the same time avoid permitting independent dealers to deal in crash parts.

Ford's purpose in preventing competition in the wholesale after-market for crash parts is for the obvious reason that competition among distributors tends to spread upwards to compel cuts in the manufacturer's own profit margins. See Adelman, "Integration and Antitrust Policy", 63 Harv.L.Rev. 27, 46 n. 19 (1949).

It has long been clear since Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 59 that if a manufacturer of a product makes use of its monopoly as the manufacturer of a product in order to expand its control over the after-market in that product, the manufacturer is in violation of Section 2 of the Sherman Act. See also Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970). Neale, supra calls such monopolies 'bottle neck' monopolies, (at 127) where the manufacturer of a product tends to use its power at the manufacturing level to eliminate competition on the wholesale level. See also Note: Refusals to Deal By Vertically Integrated Monopolists, 87 Harv. L.Rev. 1720, 1974.

In United States v. Klearflax Linen Looms, 63 F.Supp. 32, 39 (D. Minnesota, 1945) the Court made clear the distinction between the natural and inevitable monopoly of any manufacturer over its own goods at the manufacturing level and the monopolizing of the business of retail selling of such goods on the retail level.

See also United States v. General Motors Corp., 121, F.2d 376, 400 (7th Cir. 1941).

The defendant in this case has attempted to control and monopolize the after-market in the wholesaling of crash parts by preventing independent wholesalers from competing in the sale of such crash parts.

The defendant owned completely or partially some of the franchised dealers with whom the plaintiff was directly competing (Tr. 102) took a strong interest in the competition which its franchised dealers were facing from the plaintiff (Ex.17) and had received various complaints from dealers with respect to FLM competitive activities (Tr. 71) before engaging in a series of acts which were in violation of the antitrust laws, in restraint of trade and were directed toward the sole purpose of preventing the plaintiff from competing as a wholesaler of crash parts.

The defendant had a monopoly in Ford crash parts. Once it used its monopolistic position in order to restrain trade by methods which were illegal and violated Section 1 of the Sherman Act in an attempt to expand its natural monopoly and to monopolize the wholesale after-market in crash parts, the defendants at that time violated Section 2 of the Sherman Act. Neale succintly stated this proposition.

> It has always been obvious that for one having monopoly power to exert it by means of restraints of trade that would be illegal under section 1 must necessarily constitute illegal monopolizing under section 2 of the Act. at 113.

It would be in defiance of reality to assert that all of the defendants' actions which were directed at preventing the plaintiff as competing as a wholesaler of Ford crash parts were not committed by the defendant in an attempt to monopolize the wholesale after-market in crash parts.

Learned Hand stated long ago that "No monopolist monopolizes . unconscious of what he is doing." United States v. Aluminum Company of America, 148 F.2d 416, 432 (2d Cir. 1945).

The defendants' actions in attempting to monopolize the wholesale market in crash parts by reason of its monopoly as the manufacturer in such crash parts is in violation of Section 2 of the Sherman Act.

The Court in Grinnell, supra said:

> We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act.

The defendant in this case has been deriving benefits from its illegal conduct in monopolizing the wholesale after-market in crash parts. This court should prevent the defendants from continuing to monopolize the wholesale after-market in crash parts and direct the defendants to sell crash parts directly to the plaintiff. The Court has held in the past that where a defendant has been illegally monopolizing a market, the Courts may direct the monopolist to sell to all bonafide purchasers in order to "pry open to competition" the market that had been closed by the defendants' illegal restraints. International Salt Co. v. United States, 332 U.S. 392, 401 (1947); United States v. Glaxo Group Ltd., 410 U.S. 52, 62 (1973).

POINT IX

THE PLAINTIFF HAVING BEEN INJURED IN ITS BUSINESS AND PROPERTY BY REASON OF THE DEFENDANTS' VIOLATION OF THE ANTITRUST LAWS IS ENTITLED TO RECOVER TREBLE DAMAGES FROM THE DEFENDANTS.

15 U.S.C. 15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The plaintiff has suffered various damages by reason of the defendants' violation of the antitrust laws.

1. The damages incurred by the plaintiff resulting from the defendant not permitting its franchised dealers a 25% wholesale incentive allowance on crash parts sold to the plaintiff from November 1, 1972.

2. That prior to November 1, 1972, the plaintiff's business had grown at a steady rate. That subsequent to November 1, 1972, due to the defendant's actions, the growth of the plaintiff's business ceased. The plaintiff is entitled

to recover the profits lost from November 1, 1972 to date, which it would have made on the additional volume it would have done had it been allowed to expand naturally and not been interfered with by the defendants.

3. Until November 1, 1972, the plaintiff purchased its parts from Central Lincoln-Mercury at a premium of 3% above Central's cost. Subsequent to that date when the defendants directed Central to cease dealing with the plaintiff, the plaintiff was compelled to purchase its parts from other franchised dealers who charged the plaintiff 5% above their cost on all purchases of crash parts. The plaintiff is entitled to recover the additional 2% premium it has been required to pay since November 1, 1972 when the defendants directed Central to cease dealing with the plaintiff.

4. Prior to November 1, 1972, Central had permitted the plaintiff to claim half of the 5% obsolescence credits (POPP See pre-trial order Par. 16) which it received from the defendants on all of the plaintiff's purchases of crash parts. Subsequent to November 1, 1972, when the defendants directed Central to cease dealing with the plaintiff, the plaintiff has lost the benefits of the obsolescence discount it had received.

5. Prior to January 1, 1971, the plaintiff had its own code number and was receiving a 5% stock order discount on purchases of crash parts. Subsequent to January 1, 1971 when the defendats as part of its attempt to monopolize the wholesale after-market in crash parts took away the code number used by FLM, the plaintiff was unable to receive any further stock order discounts from January 1, 1971 to date.

6. Prior to January 1, 1971, while FLM had a separate code number, FLM would receive the entire 5% obsolescence credit. After the defendants revoked the code number used by the plaintiff as part of its attempt to monopolize the wholesale after-market in crash parts, plaintiff was only able to receive half of the 5% of the obsolescence credit from Central between January 1, 1971 to November 1, 1972 when the defendants directed Central to cease dealing with the plaintiff entirely.

7. The defendants, by attempting to monopolize the wholesale after-market in crash parts, by preventing franchised dealers from receiving the wholesale incentive allowance on sales of crash parts to the plaintiff, and by stating directly that they do not desire to have any independent wholesalers

of crash parts in existence, have made it obvious that they will do everything possible to prevent the plaintiff from continuing to compete as an independent wholesaler of crash parts.

The defendants' avowed intent to drive the plaintiff out of business, has destroyed the good will of the plaintiff's business since no purchaser will pay for that business knowing that the defendants are seeking for a way to prevent the plaintiff from continuing in business.

8. As part of the defendants' illegal monopolization of the wholesale after-market, the defendants have refused to sell crash parts to the plaintiff directly but have compelled the plaintiff to purchase crash parts from franchised Ford dealers and pay a premium to those franchised dealers for the privilege of purchasing crash parts. Between April 1, 1965 and November 1, 1968, the premium paid by the plaintiff to franchised dealers was 2%. Between November 1, 1968 and November 1, 1972 the premium paid was 3%. Between November 1, 1972 to date, the plaintiff has been paying a 5% premium.

In an antitrust case, damages in many instances are difficult to prove because economic harm is intangible. The courts have, therefore, taken the position that precise proof of damages is not required of plaintiffs. A just and reasonable estimate based on relevant data is sufficient. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Story Parchment Company v. Paterson Parchment Paper Company, 282 U.S. 555, 563 (1931).

Fortunately, in our case most of the items of damage suffered by the plaintiff are calculable almost precisely to the dollar since they are based upon precise percentages depending upon the amount of money which the plaintiff has paid for crash parts.

The plaintiff has proven the amount of its damages which are in evidence through the testimony of DavidL. Wasser, the accountant for the plaintiff who is fam iliar with the books and records of the plaintiff and who testified that the figures which he has supplied the Court are based upon the books and records of the plaintiff. The complete books and records of the plaintiff have been made available to the defendants and the defendents had an opportunity to and did conduct a thorough and complete cross examination of Mr. Wasser during the trial of this action. The testimony of an

accountant based upon the books and records of the company in question has always been a proper method of proving damages in an antitrust case. See William H. Rankin Co. v. Associated Bill Posters, 42 F.2d 152 (2d Cir. 1930), cert. denied, 282 U.S. 864 (1931) and Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (1970).

The only two items of damages which are not calculable with the mathematical exactitude of being based upon precise percentages of the plaintiff's purchases of crash parts are plaintiffs claim for lost profits between November 1, 1972 and present loss of good-will to date.

These two items, however, of necessity can never be computed with mathematical exactitude and the plaintiffs have submitted the testimony of David L. Wasser based upon the books and records of the plaintiff to support both of these items.

Wholesale Incentive Allowance

Since November 1, 1972 defendants have prevented franchised Ford dealers from passing on the wholesale incentive allowance to the plaintiff. This allowance had previously been passed on to the plaintiff by franchised Ford dealers.

(Tr. 118). Once the plaintiff could not receive the wholesale incentive allowance any longer, the plaintiff was compelled to absorb this allowance and sold crash parts to service stations and body shops for exactly the same price at which it had been selling crash parts prior to the wholesale incentive allowance being taken away from it by the defendant.

In Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) the Court stated:

> We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of §4.
>
> If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher.
> at 489

The plaintiff is entitled to recover the entire amount of the wholesale incentive allowance which have been denied to it by the defendant if this court finds that the denial of the

wholesale incentive allowance to the plaintiff by the defendant was in violation of either the Robinson-Patman Act, Section 1 of the Sherman Act or Section 2 of the Sherman Act.

The plaintiff's accountant has calculated the amount overpaid by the plaintiff for crash parts because it was not allowed the wholesale incentive allowance. The plaintiff's accountant has used three different methods to calculate these figures, all of which are based on the books and records of FLM. The three methods which the plaintiff's accountant used to arrive at the amount the plaintiff overpaid are set forth in Exhibit (a) appended hereto.*

2% Additional Premium Paid By FLM From November 1, 1972 to Date.

Until November 1, 1972, the plaintiff had been paying a 3% premium to Central Lincoln-Mercury. Subsequent to that date, when the defendant directed Central to cease dealing with the plaintiff, the plaintiff was compelled to purchase its parts

* The figures on Exhibit (a) reflect the plaintiff's damages to October 8, 1974 and also indicate for the Court's convenience what those damages are as extended up to January 31, 1975.

from other franchised dealers and to pay a 5% premium.

The plaintiff is entitled to recover the additional 2% premium since November 1, 1972 when the defendant directed Central to cease dealing with the plaintiff in violation of Sections 1 and 2 of the Sherman Act. (See Item 1 (d) ex. 106 for identification).

The plaintiff absorbed this additional 2% premium and is entitled to recover the entire 2% additional premium from the defendants, pursuant to the Court's statement in Hanover Shoe, supra.

One-Half Obsolescence Credit Allowance.

Prior to November 1, 1972, the plaintiff had received one-half of the 5% obsolescence credit allowance from Central. Subsequent to that date when the defendant's directed Central not to deal with the plaintiff in violation of Sections 1 and 2 of the Sherman Act, the plaintiff was unable to obtain any obsolescence credit allowance. See ex. 106 item 1 (b).

The plaintiff absorbed the 2½% loss of the obsolescence allowance, and is, therefore, entitled to recover that entire loss from the defendants pursuant to the Court's reasoning in Hanover Shoe, supra.

Lost Profits from November 1, 1972

Prior to November 1, 1972, the plaintiff's business had grown at a steady rate since its inception. Its profits had kept pace with its increased volume. After November 1, 1972 the plaintiff was unable to compete in the sale of crash parts with franchised Ford dealers.

The plaintiff's volume of business suffered accordingly. The plaintiff is entitled to recover from the defendant for those lost profits which it would have made had its business been permitted to expand at a normal rate and not been interfered with by the defendants.

The plaintiff's accountant, David L. Wanser, by using the books and records of FLM has calculated the growth rate of the plaintiff and then by taking the plaintiff's margin of profit on its volume of sales with allowance for overhead and expenses calculated the amount of profits lost by the plaintiff between November 1, 1972 and September 30,1972. (See ex. 106 Item 5) In antitrust cases, plaintiffs have always been allowed to recover for lost profits which have been caused by the defendant's violation of the antitrust laws.

See Atlas Building Products Co. v. Diamond Block and Gravel Co., 269 F.2d 950 (10th Cir. 1959); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970); Autowest, Inc. v. Peugeot, Inc., 434 F. 2d 556 (2d Cir. 1970). If the court finds that the defendants have violated the anti-trust laws and these violations have caused the plaintiff to suffer a loss of business and a corresponding loss of profits on that business, the plaintiff is entitled to recover that loss of profits from the defendant.

Good-Will

The good-will of a business are those competitive advantages inherent in an on going business beyond the value of the tangible assets of the business itself. See Note: Measuring Damages in Antitrust Cases. 36 Albany L. Rev. 773, 779 (1972).

The defendants have made it obvious and openly stated that they do not wish to have anyone but franchised Ford dealers deal in crash parts. (Tr. 562, 565) The good-will of the business is the price that a willing buyer would pay a willing seller in an open market for an active business. Standard Oil Co. of Cal. v. Moore, 251 F.2d 188 (9th Cir. 1957) Cert. denied 356 U.S. 975 (1958).

No buyer in the open market would now be willing to purchase the plaintiff's business knowing that the defendant who is the sole source of crash parts which the plaintiff resells is seeking for a means to drive the plaintiff out of business. The value that the plaintiff's business had as a going concern has been destroyed by the defendant's attempt to monopolize the wholesale market in crash parts. Even if this Court should issue an order directing the defendants to deal with the plaintiff either directly and/or directed the defendant not to prevent its franchised dealers from dealing with the plaintiff, the good-will of the plaintiff's business has been destroyed since anyone interested in purchasing the plaintiff's business would be aware that the defendants are not dealing with the plaintiff because they wish to do so, but under a court order, and if the defendants can in any way avoid that court order, they would cease dealing with the plaintiff.

The plaintiff is entitled to recover for the good-will of its business which has been destroyed by the defendant's violation of the antitrust laws and their attempt to

monopolize the wholesale after-market in crash parts.

The good-will of the plaintiff's business has been calculated on a conservative basis by David L. Wasser the accountant for the plaintiff. (See ex. 106 item 1 (e)) Although the defendants have contested the use of a multiplier of ten for the earnings of the plaintiff in arriving at good-will, ten has been the standard multiplier used in these cases. See Coleman Motor Company v. Chrysler Corporation, 376 F.Supp. 546, 564 (W.D. Pa. 1974) See also Capitalized Pricing of Injury to Capital In Treble Damage Suits, 45 Cornell L.Q. 84 (1959). It is for the trier of fact to determine what the good-will of a business was after hearing of the evidence. See Note:Private-Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business. 80 Harv.L.Rev. 1566, 1577 (1967).

If the plaintiff recovers the profits it has lost from November 1, 1972 to date, its recovery will not be duplicated by also recovering the lost good-will of its business. The lost profits which the plaintiff is seeking to recover are past lost profits from November 1, 1972 up to the date of judgment. The good-will of the business

the plaintiff is seeking to recover is the depreciation in the value of the business at the present date, when the going concern value of the plaintiff's business has been diminished by the defendant's violations of the antitrust laws.

The ceses have clearly stated that these two items, past lost profit and loss of present good-will do not constitute a duplication of damages in an antitrust suit. See Atlas Building Products Co. v. Diamond Block and Gravel Co., 269 F.2d 950 (10th Cir. 1959) and Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970). Cases such as Albrecht v. Herald Company, 452 F.2d 124 (8th Cir. 1971) are not to the contrary. Those cases only state that you cannot recover both the damages to the business as a going concern and the damages suffered because of loss of future profits. It does not, however, prevent you from recovering past lost profits as well as injury to the present going concern value of the business.

Stock Order Discount and Obsolescence Credit

Prior to January 1, 1971, the plaintiff had its own

code number and was receiving a 5% stock order discount on approximately one-half of its crash part purchases. In January, 1971 when the defendants revoked the plaintiff's separate code number the plaintiff no longer received the stock order discount (Tr. 142). Similarly, after the defendants revoked the plaintiff's separate code number, the plaintiff did not receive one-half of the 5% obsolescence credit which it had received when it had its own code number. (Tr. 143) If the court finds that the reason the defendant revoked the plaintiff's separate code number was in order to prevent it from competing with franchised Ford dealers and as part of its attempt to monopolize the after-market in crash parts, then the plaintiff is entitled to recover for the stock order discount and obsolescence credits which it was compelled to pay because of the defendant's violation of the antitrust laws. The amounts which the plaintiff has been damaged because of the denial of the stock order discount and obsolescence credits is set forth in ex. 106, A(c) and 2.

Defendant's Refusal to Sell Crash Parts to the Plaintiff.

Since the inception of its businessin 1965,the defendants have refused to sell crash parts directly to the plaintiff and have compelled the plaintiff to purchase crash parts through franchised Ford dealers and to pay a premium. If this Court finds that the defendants refused to deal with the plaintiff as part of their attempt to monopolize the wholesale after-market in crash parts then the plaintiff is entitled to recover all those premiums which it paid to franchised Ford dealers because of the defendant's violation of the anti-trust laws. The amounts paid by the plaintiff to franchised Ford dealers as premiums are set out in ex. 106 item 3.

The defendants are not entitled to any discount for any income taxes which the plaintiff would have had to pay on those monies which it would have earned had its business not been interfered with by the defendants.

Any monies which the plaintiff recovers from the defendant will be taxed at the time of recovery. See Commissioner of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426 (1955). See also Hanover Shoe, supra at 503.

The plaintiff has available, and will supply any additional documents or testimony which this Court feels are necessary in order to substantiate the items of damage set forth above. However, since all of the items of damage are based upon the books and records of the plaintiff which were made available to the defendant, there can be no serious dispute as to their accuracy.

CONCLUSION

The defendants have violated the antitrust laws of the United States, in particular 2(a) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act, which have substantially injured the plaintiff in its business. The plaintiff is entitled to recover treble damages for any damage which it has suffered plus a reasonable attorneys' fee and the costs of this action. The plaintiff is entitled to an injunction enjoining the defendants from continuing their violation of the antitrust laws in the future and an order directing the defendants to sell crash parts to the plaintiff.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

Of counsel

Alfred S. Julien
Stuart A. Schlesinger
David Jaroslawicz
David L. Nasser

FLM COLLISION PARTS, INC.
AFFILIATION OF AUDIT TEST PERIOD RATES OF INCENTIVE CREDITS
TO TOTAL FORD CRASH PARTS PURCHASES OF FLM, 11/1/72-9/30/74

Method (1)
Applying Average of Incentive Credits
To Entire Purchases Out-Of, 11/1/72-10/1/74:

Wholesale Incentive Credits		$ 96,319.36
Purchases, Ford Parts		548,133.87
Credits/ Purchases		17.2%
Rate, August, 1974 (Lintos, etc., Excluded)		
Credits	$11,108.36	
Purchases	90,855.41	
Credits/ Purchases	12.4%	
Average of Beginning and End	14.8% x	
$1,122,659 Purchases		= $166,154
Additional to Date, .148 x $27,820		= 4,517
9/30/74 - 10/8/74		
10/9/74 - 1/31/75 .148 x 156,147 (Approx.)		170,671
		22,110
	Total	193,781

Method (2)

Incentive Credits, Test Period, Other Sheet $41,435.54 x 100/26.3 = Test Percentage		= 157,542
Additional to Date .025* x $157,541		3,939
9/30/74 - 10/8/74		161,481
10/9/74 - 1/31/75 .139 x 157,541		21,898
	Total	183,379

Method (3)

Atlas, October 1972 Incent. Cr./Purchases	16.3%
August, 1974 Rate	12.4%
	28.7

Average 14.4% x $1,122,659 = 161,663

Additional to Date, .144 x $27,820 = 4,007
9/30/74 - 10/8/74
10/9/74 - 1/31/75 .144 x 156,147 = 22,485
*Approximate, 9/30/74 - 10/8/74 = $27,820 = .025
" 11/1/72-9/30/74 = $1,122,659 = 188,151

" 10/9/74-1/31/75 156,147 / 1,122,659 = .139
" 11/1/72-9/30/74

EXHIBIT 'A'

[illegible] SUBSIDIARY [illegible]

SUMMARY OF [illegible] PURCHASES OF FORD [illegible], INCLUDING AMOUNTS PURCHASED OF FORD [illegible] AND DETAIL OF CALCULATED INCENTIVE CREDITS OR CLAIMS,
NOV. 1, 1973 - Sep. 20, 1974

Price Book Period	Folder No.	Wholesale Incentive Cr.	Ford Parts Purchases
October 31, 1973-Jan. 30, 1973	1	$ 843.31	$ 5,091.47
" "	2	846.14	6,204.63
" "	3	117.12	840.05
" "	4	6,740.06	46,849.61
" "	5	1,402.44	7,983.95
" "	6	5,057.77	37,153.62
" "	7	2,500.63	12,577.66
" "	8	3,748.27	22,715.67
January 31,1973-Feb. 19,1973	12	945.53	8,082.52
" "	18	593.72	4,299.43
February 20, 1973-April 20,1973	9	7,532.19	52,071.44
Mid May,1974 -June 1,1974	13	2,580.66	21,674,61
June 1, 1974-July 31,1974	10	4,451.47	36,577.98
" "	11	182.51	1,071.39
Aug. 1,1974 -Aug. 31, 1974	14	42.47	325.76
" "	15	1,182.96	9,680.64
" "	16	422.79	3,347.93
" "	17	2,245.50	16,184.10
Total of Test Folders		41,439.54	294,730.76
Total FLM Purchases of Ford Crash Parts, 11/1/73-9/20/74			1,122,658.81
Fur Rates Tested,/ Total Purchases			26.3%
Calculated Incentive Credits for Entire Period: 41,439.54 x 100 / 26.3			157,542.
Additional to Date, 9/20/74 - 12/[illegible]/74			3,939.
			161,481
10/9/74 - 1/31/75			×1.898
			183,379 (SEE NEXT PAGE)

Defendants' Post-Trial Brief, March 14, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (T.P.G.)

- x

DEFENDANTS' POST-TRIAL BRIEF

SULLIVAN & CROMWELL
Attorneys for Defendants
48 Wall Street,
New York, New York 10005.
(212) 952-8100

Robert MacCrate,
William M. Dallas, Jr.

William A. Zolbert
Office of the General Counsel,
Ford Motor Company

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC., :

Plaintiff, :

-against- : 73 Civ. 713 (T.P.G.)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

- x

DEFENDANTS' POST-TRIAL BRIEF

Introduction - In this comprehensive Post-Trial Brief for Defendants,* the specific questions posed by the Court at the post-trial conference on January 16, 1975 and in the Court's Memorandum to Counsel of January 17, 1975 are treated against the background of the trial record and the basis upon which we urge that judgment should be entered for defendants is set forth.

From the Table of Contents and Table of Authorities it will readily appear where in the brief particular questions

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* For the purposes of brevity, the term "defendants" will be used to refer to Ford Motor Company, Ford Marketing Corporation, or both, as appropriate. At the close of business on December 31, 1974, Ford Marketing Corporation ceased doing business and was merged into Ford Motor Company.

posed by the Court have been addressed and arguments made by plaintiff in its Post-Trial Brief have been answered.*

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* References to Plaintiff's Post-Trial Brief are shown as "Pl. Post-Tr. Br.". Citations to pages of the trial transcript are preceded by "Tr." and to pages of the transcript of the post-trial conference are preceded by "P.T.C.". Citation of paragraphs of the stipulation of facts contained in the pre-trial order of September 20, 1974 are preceded by "Stip.". The symbol "PX" denotes exhibits of plaintiff received in evidence; "DX" denotes exhibits of defendants.

I. THE NATURE OF THE ACTION

Plaintiff FLM Collision Parts, Inc. ("FLM") challenges defendants' uniform system for the nationwide distribution of defendants' "crash parts" contending that because of the alleged local effect upon plaintiff of the disallowance of a wholesale allowance the entire distribution system violates Section 2(a) of the Clayton and Robinson-Patman Acts and Sections 1 and 2 of the Sherman Act. (Pl. Post-Tr. Br. 8-9)

"Crash parts" are used in the repair and replacement of parts on automobiles and include fenders, grills, hoods, deck lids, door panels, quarter panels, rocker panels and body side mouldings, all custom-designed and manufactured for particular years and models of a vehicle. (Stip. 5) Crash parts are to be distinguished from many other automotive parts (such as batteries, spark plugs and filters) which are manufactured by automobile manufacturers and others for use on vehicles of various manufacturers and which are available from various sources. (Stip. 6)

Ford, Lincoln and Mercury crash parts are manufactured both by defendants, and by other manufacturers, using dies owned by defendants, who make the parts to defendants' specifications and sell them only to defendants. (Stip. 4)* Defendants at all times have sold crash parts for Ford, Lincoln and Mercury vehicles (except for exports from the United States or directly to the Federal Government) exclusively to franchised dealers for use in their own body shops and repair operations or for resale. (Stip. 10) The 6,800 dealers in the United States (Stip. 14) in turn either use the parts in their own body shop repair operations or resell them to others, including FLM.

Defendants have adopted a system of discounts, allowances and credits set forth in Master Price Lists, which apply to their sales of crash parts to their franchised dealers on a uniform national basis. (Stip. 16, Tr. 463) All discounts, allowances and credits with respect to sales by defendants of crash parts are credited or paid directly to the franchised dealers to whom such parts are sold by defendant. (Stip. 21)

Plaintiff's complaint stems from its allegation that after November 1, 1972 the prices it paid franchised dealers for crash parts were increased by those dealers.

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* Contrary to plaintiff's representations (Pl. Post-Tr. Br. 1, 59), defendants' crash parts are not patented.

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Plaintiff claims that a change made in July 1971 in defendants' system of discounts, allowances and credits to defendants' dealers was responsible for these price increases and that it has a claim therefor under the Clayton Act, Section 2(a) and the Sherman Act, Sections 1 and 2. FLM commenced this action in February 1973 with a general prayer for both damages and equitable relief. At no time, however, has plaintiff set forth in any coherent manner the specific injunctive relief which it seeks except to demand that defendants be ordered to sell crash parts directly to plaintiff. (Pl. Post-Tr. Br. 82)

II. STATEMENT OF FACTS

A. The Parties

Defendant Ford Motor Company ("Ford") is a corporation organized and existing under the laws of Delaware with its principal place of business in Dearborn, Michigan. It is primarily engaged in the manufacture and sale of automotive vehicles and related parts and accessories. (Stip. 3) Defendant Ford Marketing Corporation ("FMC"), a wholly-owned subsidiary of Ford, was also a corporation organized and existing under the laws of Delaware whose principal place of business was in Dearborn, Michigan. (Stip. 7) FMC was incorporated in May 1970 and from July 1970 through December 1974 was engaged in the sale of Ford, Lincoln and Mercury automobiles manufactured by Ford and related parts and accessories manufactured by Ford and others, which functions had previously been performed by Ford itself. (Stip. 8)

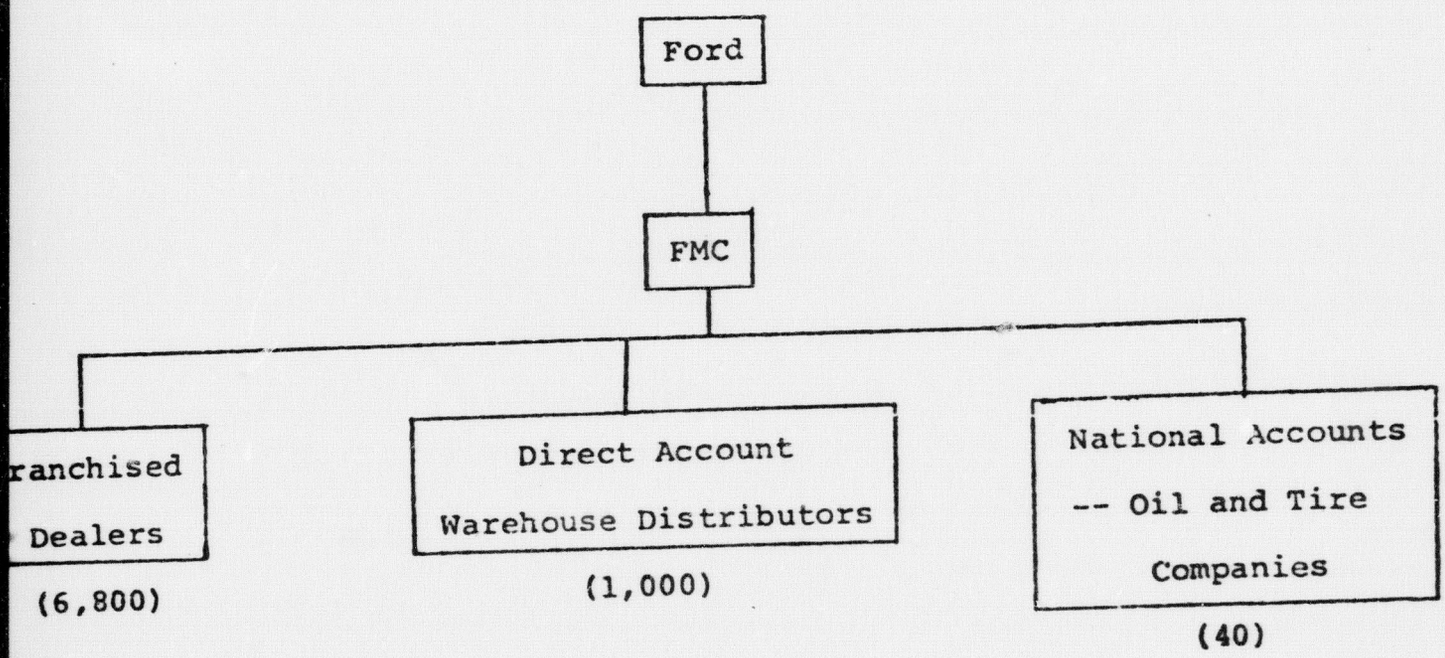
Plaintiff FLM is a corporation organized and existing under the laws of New York with its principal place of business in Yonkers, New York. (Stip. 1) Since its incorporation in April 1965, the business of FLM has included the purchasing of Ford, Lincoln and Mercury "crash parts" from franchised dealers and the reselling of those parts to others, including independent garages, service stations and repair or

"body" shops engaged in automotive service and repair work. (Stip. 2) FLM has never purchased crash parts from defendants. (Stip. 22)

B. The Distribution System for Defendants' Parts.

Defendants distribute automotive parts, including crash parts, through a nationwide system comprised of three channels -- (1) franchised dealers, (2) direct account warehouse distributors and (3) national accounts. (DX. I) Crash parts are sold only through the franchised dealer channel. Many other automotive parts, such as batteries, spark plugs and filters, which are produced by various manufacturers and which may be used in different makes of automobiles, are sold through all three channels. (Tr. 484) These initial steps chosen by defendants for distribution of their automotive parts are presented diagrammatically in Chart 1.

CHART 1


Ford
FMC
ranchised
Dealers
(6,800)
Direct Account
Warehouse Distributors
(1,000)
National Accounts
-- Oil and Tire
Companies
(40)

The portion of the distribution system shown in Chart 1 is the only portion of the distribution system over which defendants exercise any control. Once parts have been sold by defendant to a franchised dealer, a direct account warehouse distributor or a national account, defendants do not place nor attempt to place any restriction or control as to the territory within which such parts may be sold, the customers to whom they may be sold, or the terms or prices of their resale. (PX. 9)

Tracing the flow of parts down through the distribution system requires two additions to Chart 1 to reflect the different levels of distribution at which the purchasers from defendants operate. First, direct and national accounts are considered "distributors" since they sell parts to jobber-wholesalers. (Tr. 554) Second, franchised dealers play a dual role in the distribution system of parts. Some parts purchased by the dealers are resold by them to body shops, fleets and service stations, and the dealer thus acts as a jobber-wholesaler. (Tr. 555) Other parts purchased by dealers are used in their own automobile repair and servicing operations and the dealer thus acts as a "retailer" or "dealer". (Tr. 564) These aspects of the distribution system are shown diagrammatically on Chart 2.

C H A R T 2

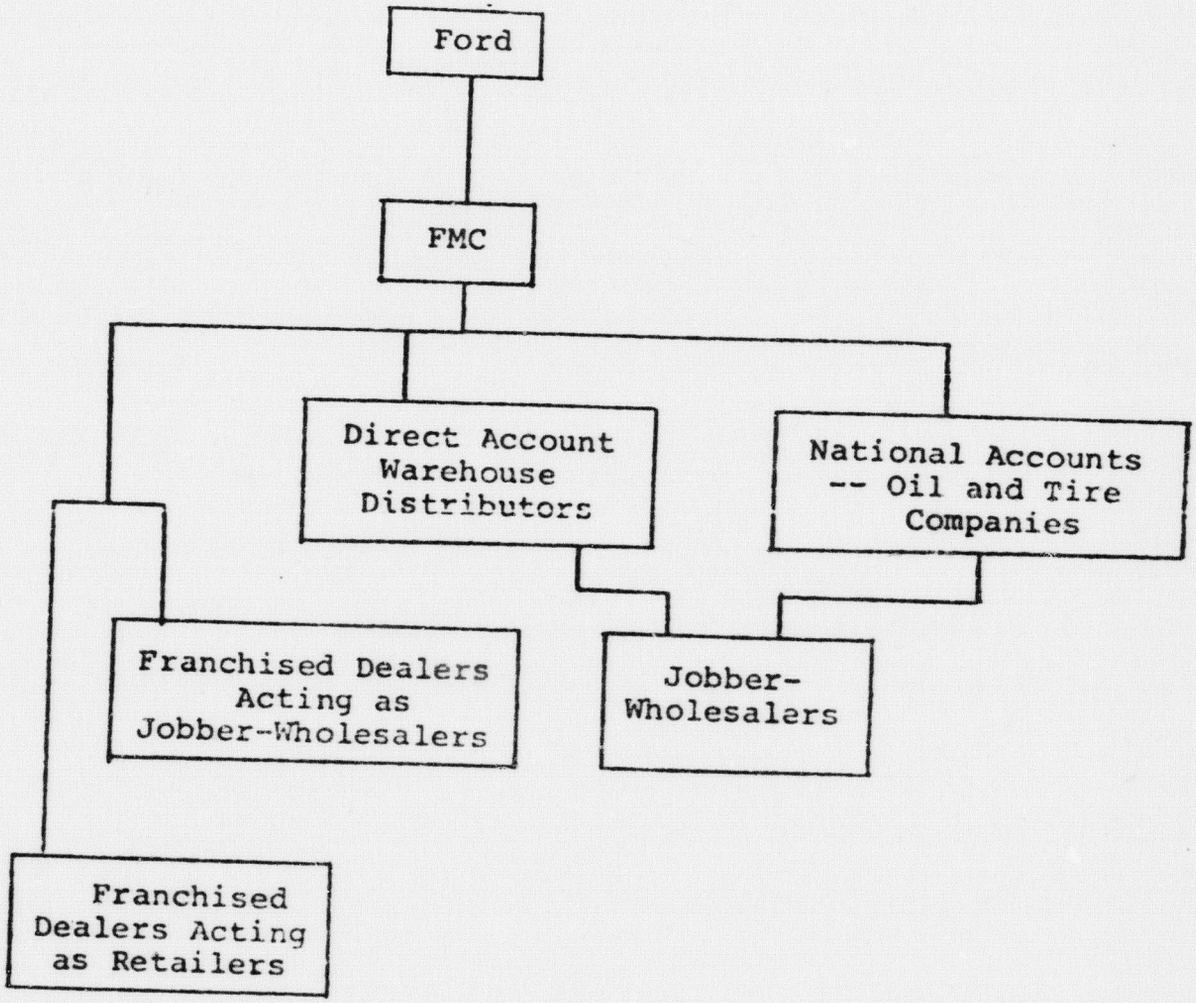
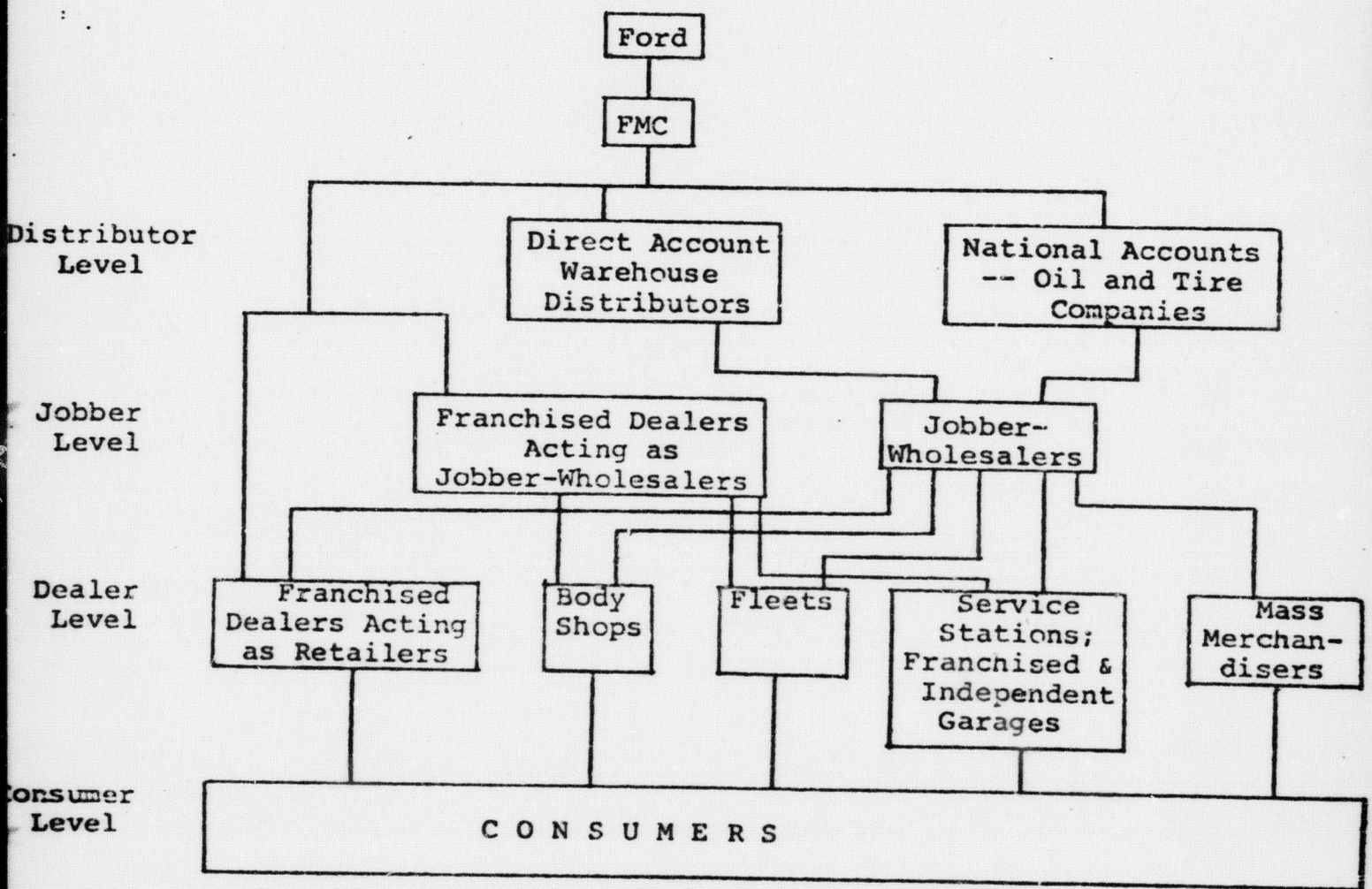

Ford
FMC
Direct Account Warehouse Distributors
National Accounts -- Oil and Tire Companies
Franchised Dealers Acting as Jobber-Wholesalers
Jobber-Wholesalers
Franchised Dealers Acting as Retailers

Chart 3 (DX. I) shows defendants' complete system of distribution for automotive parts by adding to Chart 2 sales of parts by franchised dealers and other jobber-wholesalers to body shops, fleets, service stations, garages and mass merchandisers. These entities, as well as franchised dealers, act as retailers and sell parts to their ultimate consumers -- automobile owners.

CHART 3



Crash parts, as noted above, are sold by defendants only to franchised Ford and Lincoln-Mercury dealers, but are ultimately available to the public from franchised dealers, body shops, service stations, garages franchised by oil or tire companies and independent garages. (DX. I)

Defendants stock more than 240,000 different parts for all Ford, Lincoln and Mercury automobile models for at least the five most recent model years. (Stip. 11) Approximately 200,000 different automotive parts, including those rarely required, are available through defendants' National Parts Distribution Center in Michigan; 42,000 different automotive parts, including all those commonly required, are available through defendants' 8 Master Parts Distribution Centers (Stip. 12) (including one in Teterboro, New Jersey for the New York-Metropolitan area); and approximately 14,000 different automotive parts, only those most frequently required, are available through defendants' 20 Class A Depots throughout the country. (Tr. 737-8)

C. Defendants' Prices and Terms of Sales.

Defendants' sales of automotive parts through its three distribution channels (franchised dealers, direct account warehouse distributors and national accounts) throughout the United States are made on terms and prices set by

defendants on a uniform national basis. (Tr. 463) These prices and terms are published in the Master Price Lists, and in the Policy and Procedure Manual. (Stip. 14) The Master Price Lists and the Policy and Procedure Manual set up a pricing system for automotive parts based upon the level of the buyer in the distribution system described above and illustrated in Chart 3 -- as a distributor, jobber-wholesaler or dealer. The price which defendants charge franchised dealers acting as retailers for a particular part as set forth in the Master Price Lists is used as a benchmark for the pricing system and other prices are computed from it. (Stip. 15)

Franchised dealers are eligible to receive certain discounts, allowances and credits from defendants on their purchases of crash parts as well as on their purchases of other parts. These discounts, allowances and credits are set forth in the Policy and Procedure Manual. They are:

1. The Stock Order Discount. All automotive parts stocked by Class A depots are listed on a printed stock "order pad" of order forms supplied to franchised dealers. (Tr. 712) Each dealer is entitled to order on this form from its Class A depot on a specified day of the week any parts stocked by defendant and receives a 5% discount on such purchases because the regularity of the orders

enables defendants' Class A depots to operate more efficiently and economically. (Tr. 711-2)

2. The Wholesale Incentive Allowance. See pp. 15-19, infra.

3. The Parts Obsolescence Protection Program ("POPP") Credit. Franchised dealers may return obsolescent parts in their inventories to defendants and receive full credit for their purchase price. POPP credits granted for any given period are limited to 5% of the dollar amount of the franchised dealer's purchases during that period. POPP Credits are not granted unless parts are returned. (Stip. 16(c))

4. The Surplus Inventory Reduction Program ("SIRP") Credit. Franchised dealers may return surplus parts in their inventories to defendants and receive credit for a portion of their purchase price. SIRP credit for any given period is limited to 3% of the dollar amount of the franchised dealer's purchases during that period. SIRP credits are not granted unless the parts are returned. (Stip. 16(d))

The Stock Order Discount, POPP and SIRP credits are all available to franchised dealers regardless to whom they sell -- including, for example, sales to FLM. (Tr. 63-5)

D. The Wholesale Incentive Allowance.

1. The origin of the wholesale incentive allowance on defendants' sales of crash parts to franchised dealers.

The wholesale incentive allowance was established long prior to its extension to crash parts in 1968. (Tr. 476) The underlying concept for the policy was to encourage franchised dealers to be active in the wholesaling of automotive parts by giving the dealer a lower acquisition cost than when the dealer acted as a retailer. This lower acquisition cost was at a price comparable to that paid by competing independent wholesalers and jobbers selling similar parts available from competing manufacturers to the same type of retail customers. (Tr. 476) The impetus for this concept had little application to crash parts since defendants were the sole supplier of these parts to a relatively inelastic market, and hence there was no apparent sales reason to provide an incentive to encourage the dealer to wholesale such parts. (Tr. 484)

Instead, the extension of this wholesale incentive policy to crash parts was at the behest of the Federal Trade Commission to stimulate competition between independent body shops and service stations and the repair shops of franchised dealers. Plaintiff's allegation that defendants attempted to avoid a "competitive after market" in the wholesaling of crash

parts is wholly unsupported by anything in the record, nor does plaintiff cite any supporting evidence. (Pl. Post-Tr. Br. 4) The incentive was intended to utilize defendants existing distribution system by encouraging franchised dealers to sell crash parts to independent body shops at prices comparable to those paid by franchised dealers when they retail such parts in their own body shops. (DX. CS-CV, Tr. 575) Indeed, the documentary exhibit relied on by plaintiff (PX. 9) evidences defendants' encouragement of their dealers to pass on the benefits of the incentive to independent body shops.

2. Modification of the wholesale incentive allowance policy.

Consideration of policy changes with respect to the wholesale incentive began in 1970, when officials of defendants became concerned over significant increases in wholesale incentive costs incurred during 1969. (Tr. 490-1) During the latter half of 1969, due to rapidly escalating wholesale costs, defendants conducted dealer audits and initiated a detailed study of the wholesale incentive system. (Tr. 493-4) The study focused on at least three areas of concern. First, there was concern with the lack of "control" over incentive allowance payments for transactions involving sales to ineligible*

* It should be noted that the term "ineligible" does not mean that such a customer cannot purchase parts, but only that the sale of parts to such a customer does not entitle the selling dealer to a wholesale incentive allowance.

customers such as insurance companies and other franchised dealers. (Tr. 494-5, 550-1) In such cases an ordinarily eligible customer could act as an intermediary or a conduit between the franchised dealer and the ineligible customer. In this way, due to the incentive paid the first dealer, the ineligible customer could receive the parts from the intermediary at a lower acquisition cost than if it had purchased the parts directly from the franchised dealer who would not receive the incentive allowance on such a sale. If the ineligible customer were a dealer, its acquisition costs would be lower than if it purchased the parts directly from defendants. (Tr. 526, 782)

While a dealer is, of course, generally free to follow purchasing practices that enable it to acquire parts at prices lower than it can get directly from defendants, this principle does not reasonably apply to the situation where defendants are presented with a second claim for an incentive on the same part (i.e., by the ineligible purchasing dealer also claiming an incentive upon subsequent resale). (Tr. 526-32, 782) This problem arose due to the inability of defendants to detect such practices since they had no right to audit the intermediary's books (assuming, of course, that the intermediary is someone other than a franchised dealer). (Id.)

Thus, one reason for changing the policy with respect to this wholesale incentive was to prevent such improper practices by franchised dealers by making sales to wholesalers ineligible for the incentive allowance.

A second and basic concern was that the wholesale incentive allowance was being paid to franchised dealers when they were not performing the wholesaling function. (Tr. 495-6, 563-4) Performing the wholesaling function entails moving the merchandise from the wholesaler level down to the retailer level. (Tr. 496) Sales to another wholesaler simply do not fulfill this function, but merely move the goods laterally at the same distribution level. Additionally, the wholesaling of automotive parts entails substantial investments in inventory and facilities and defendants concluded that continuing to grant the incentive upon sales by dealers to other wholesalers would in effect encourage dealers to attempt to be treated as wholesalers without having made the necessary additional investment or assumed the duties and responsibilities of a wholesaler. (Tr. 564-6)

A third concern of defendants was that franchised dealers who sold automotive parts to wholesalers would claim entitlement to the still lower acquisition cost of a warehouse distributor even though they did not possess the qualifications to act as a warehouse distributor and they were not

recognized as such either by defendants or the trade. (Tr. 554-66) While this problem could arise with respect to crash parts, it was particularly acute in those product lines utilizing dual channels of distribution. For example, "Motorcraft" parts are sold both to direct account warehouse distributors and to franchised dealers. The warehouse distributors perform the distributors' function by selling to wholesalers and are thereby entitled to an appropriate additional trade discount. In contrast, franchised dealers normally perform the wholesalers' function by selling to retailers such as independent body shops and are thereby entitled to a single trade discount in the form of a wholesale incentive allowance. To avoid the problem of franchised dealers claiming an additional trade discount for a function they were not qualified to perform, defendants decided to refuse to recognize dealers as warehouse distributors and to make sales to wholesalers ineligible for the wholesale incentive allowance. (Tr. 557)

E. Sales of Crash Parts by Franchised Dealers.

As already noted, the discounts, allowances and credits, including the wholesale incentive allowance, with respect to sales by defendants of crash parts are credited or paid directly to the franchised dealers to whom such parts are sold by defendants. (Stip. 21) Franchised dealers individually decide the prices at which and the terms on which

they resell crash parts to their customers. (PX. 9) Defendants do not control that decision. Franchised dealers may or may not elect to reflect, in whole or in part, in their prices and terms of sales to any particular customer any discounts, allowance or credit which they receive from defendants with respect to their purchases of crash parts. Whether a franchised dealer reflects in its prices or terms of sale any portion of the discount, allowance or credit received by it from defendants does not in any way affect its receipt by the franchised dealer. (DX. G, Tr. 64-5)

F. FLM's Business in Crash Parts.

Since its incorporation in April 1965, FLM has conducted a local business primarily in the Bronx and southern Westchester County in which it purchased Ford, Lincoln and Mercury crash parts from franchised Ford and Lincoln-Mercury dealers and resold such parts to independent body shops, garages and service stations in that area. (Stip. 2, Tr. 705) There is no evidence that FLM has ever performed a recognized role in defendants' crash parts distribution system, but only that it merely functioned as an added intermediary between franchised dealers and retail customers.

FLM has from time to time purchased crash parts from only four Ford or Lincoln-Mercury dealers: Central

Lincoln-Mercury Corp. ("Central") of Brooklyn (dealership sold to Atlas Lincoln-Mercury, Inc. ("Atlas") in July 1972), Thomas Motors, Inc. ("Thomas") of Yonkers, Parkview Lincoln-Mercury, Inc. ("Parkview") of Yonkers and Pleasantville Ford, Inc. ("Pleasantville") of Pleasantville. (Stip. 22)

Whatever its source or sources of supply, FLM's dollar volume of sales of crash parts has increased steadily over the years, including the period after defendants' modification of the wholesale incentive allowance policy was made effective with respect to resales to FLM. (Stip. 30) The prices FLM pays various franchised dealers for the parts it purchases, the terms on which it buys the parts and the choice of dealers with which it does business are all matters for negotiation between FLM and the dealers, and defendants have not played nor sought to play any role in such matters. (PX. 9, Tr. 520-1)

From November 1, 1968 until July 1, 1971 franchised dealers selling crash parts to FLM were not foreclosed under the language of the Policy and Procedure Manual with respect to "ineligible sales" from claiming wholesale incentive allowance credits from defendants on such sales. On July 1, 1971, for reasons stated above, the statement of the Wholesale Incentive Program in the Manual was clarified with respect to "ineligible sales" to specify as ineligible: "Sales to any

customers NOT engaged in automotive service or repair work except export agencies. . . ." (EX. AH) FLM does not dispute that it clearly falls within this ineligible category. (Pl. Post-Tr. Br. 6)

Despite this clarification in the statement of the Wholesale Incentive Program, both Central and, later, Atlas continued to claim from defendants wholesale incentive allowance credit for sales to FLM until November 1, 1972, some 16 months after the policy change. (Stip. 24)

An oversight on the part of the responsible employees of defendants led defendants to continue to pay wholesale incentive allowance credit claimed by Central and Atlas with respect to such sales until November 1, 1972. When this error was discovered by the responsible personnel at defendants, the payment of such credit was promptly terminated, and since that date, no franchised dealer has received wholesale incentive allowance credits from defendants for resales to FLM. (Stip. 26)

INTRODUCTION TO ARGUMENT

The succeeding sections separately analyze against this factual background the various legal theories and claims for relief tendered by plaintiff. Section III addresses plaintiff's contentions that it has both standing to sue and a cause of action under the Robinson-Patman Act. Section IV responds to plaintiff's assertions that defendants have violated Sherman Act, Section 1. Section V reviews plaintiff's allegations of a violation of Sherman Act, Section 2. While we do not believe that the Court should reach the issue of relief, in the interest of completeness, Section VI considers plaintiff's demands for damages and Section VII addresses plaintiff's varying suggestions as to injunctive relief.

III. PLAINTIFF HAS FAILED TO ESTABLISH A CLAIM UNDER THE ROBINSON-PATMAN ACT

The undisputed fact that plaintiff was never a direct purchaser of crash parts from defendants poses two insurmountable obstacles for plaintiff. First, plaintiff must show that it has standing even to assert a Robinson-Patman Act claim.* Second, assuming plaintiff has standing, it must demonstrate that it has a cause of action under this Act.

As analyzed in detail in this section, the essential requirements which plaintiff must meet are: (a) for standing to sue, that the plaintiff be a purchaser from the alleged discriminator, and (b) for a cause of action, that the purchasers from the alleged discriminator be treated unequally. Unless plaintiff is able to invoke the "indirect purchaser doctrine", which we submit it may not, plaintiff is not a purchaser and its Robinson-Patman claim must be dismissed for lack of standing. In addition, since defendants' actual customers are treated identically there is no discrimination and thus plaintiff has no cause of action.

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* Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13(a)).

A. Plaintiff Lacks Standing to Assert a Price Discrimination Claim Since it is Not a Purchaser from Defendants

During the post-trial Conference held January 16, 1975, the Court requested that the parties address themselves to the issue of whether plaintiff would have standing to raise a claim under Section 2(a) of the Clayton Act, assuming arguendo that there existed an unlawful price discrimination in favor of franchised dealers selling crash parts to independent body shops not enjoyed by franchised dealers selling similar parts to FLM. (P.T.C. 4-5)

We submit that plaintiff lacks standing to assert a Robinson-Patman claim under the applicable statutory provisions, relevant legislative history and the decisional law. Additionally, we urge the Court to consider the serious implications of a contrary holding. Giving plaintiff standing to assert Robinson-Patman claims which properly belong to franchised dealers would open defendants to double liability (actually sextuple liability and double attorney's fees) for any single act of discrimination that might be found since recovery by plaintiff would not preclude similar recovery by franchised dealers for the same act of price discrimination. Nothing in the Robinson-Patman Act supports such a punitive policy.

Second, plaintiff's standing to assert a claim under Section 2(a) renders completely nugatory the express proviso of that section preserving the right of sellers to select their own customers. In effect, giving plaintiff standing to assert a Section 2(a) claim would be equating a direct purchaser's customer with the purchaser. The Court would be saying: "Ford, you must treat FLM as your customer because several of your franchised dealers whom you have selected as your customers have on their own chosen to sell to FLM even though you have never desired FLM as your customer and have consciously and purposefully rejected FLM as a direct purchaser." We submit that this would be an unjustified repudiation of the express language of Section 2(a).

1. Section 4 of the Clayton Act must be read in conjunction with the requirements imposed by the Robinson-Patman Act and the legislative history of each Act.

Section 4 of the Clayton Act (15 U.S.C. § 15) is a broadly worded provision stating the most rudimentary requirements for standing to sue under the antitrust laws. It provides in relevant part:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Plaintiff's assertion of injury because of the disruption of its previously profitable relationship with several of defendants' franchised dealers is insufficient to give it standing under Section 4:

> "It is well settled that despite its broad language § 4 of the Clayton Act does not give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws." Snow Crest Beverages v. Receipe Foods, 147 F. Supp. 907,909 (D. Mass. 1956).

Section 4 spans the spectrum of antitrust laws ranging from Sherman Act, Sections 1 and 2 claims to and including price discrimination under the Robinson-Patman Act, and the legislative history of Section 4 confirms that it was intended only to be supplementary to the substantive provisions of the antitrust laws. S. Rep. No. 698, 63d Cong., 2d Sess. 9 (1914). Hence Section 4 must be read in conjunction with the jurisdictional requirements imposed by the substantive antitrust provisions which are in issue.

The Supreme Court has emphasized recently that the jurisdictional requirements of Section 2(a) are more stringent than those imposed by the Sherman Act. Gulf Oil Corp. v. Copp Paving Co., 43 U.S.L.W. 4059, 4062 (December 17, 1974). Clayton Act, Section 4, which establishes the right of a private party to bring suit, also must be applied in accor-

dance with the jurisdictional requirements of Section 2(a).

In applying the broad language of Section 4 to specific substantive provisions, the Second Circuit Court of Appeals has developed the so-called "target test".* See e.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292 (2d Cir.), cert. denied, 406 U.S. 930 (1971); Fields Productions, Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971); S.C.M. Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 953 (1969).

The questions posed by the "target test" are fundamentally twofold: (a) is plaintiff a member of the class of persons intended to have a cause of action under the particular provision of the antitrust laws invoked, and (b) if so, was plaintiff's injury causally connected to the claimed violation of the antitrust laws. See e.g. Billy Baxter, Inc. v. Coca-Cola Co., supra at 187.

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* The "target test" has also been adopted by the Fourth and Ninth Circuits. See e.g., South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

We submit that plaintiff's status is not one that Congress intended to provide with a cause of action under Section 2(a), thus the question of whether plaintiff has sustained injury causally related to a violation of Section 2(a) becomes irrelevant. Plaintiff lacks standing.

Section 2(a) provides in pertinent part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, or such commodities are sold for use, consumption, or resale within the United States . . ., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or customers of either of them: . . . provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . . ."

The crucial words under Section 2(a) relevant to the issue of standing are "to discriminate in price between different purchasers"; this phrase defines the class of persons Congress intended to give a cause of action for a violation of the Section. That Congress intended to limit the class to direct purchasers is clear from the legislative history. The Senate Judiciary Report states: "Section 2(a) attaches to competi-

tive relations between a given seller and his several customers . . ." S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) (emphasis added). And the House Report defines the protected class in even more unambiguous language: "Section 2(a) attaches to competitive relations between a given seller and his customers. It concerns discrimination between customers of the same seller." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936) (emphasis added).

The Court in its post-conference Memorandum to Counsel dated January 17, 1975 inquired as to the significance of the following clause in Section 2(a) as it relates to the issue of standing: "where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." (paragraph 1, emphasis in memorandum). This clause simply identifies the levels of competition at which injury to competition may occur and support a claim under the Act by the protected class of customers. "The language clearly is not meant to define 'purchaser' but to indicate the conditions under which a discrimination is actionable . . ." Klein v. Lionel Corp., 138 F. Supp. 560, 563 (D. Del.), aff'd, 237 F.2d 13 (3d Cir. 1956). That is, the words "customers of either of them" de-

fine only the violation and not who has standing.

Standing depends upon Section 4 as interpreted by the courts under the "target" theory. The evidence is clear in this case that the target of defendants' policy was their dealers not FLM. The wholesale incentive policy and the modifications of that policy were directed at the dealers and not FLM. If anyone had a cause of action, it would be the dealers. See pp. 45-7, infra.

Thus FLM can find support neither in the statute nor the legislative history for its claim of standing as a purchaser's customer to assert secondary-line injury.

2. Decisional law clearly holds that plaintiff lacks standing to claim secondary-line injury.

We begin our review of the case law with an examination of plaintiff's argument that the clause "customers of either of them," gives a customer of the direct purchaser such as FLM, standing to assert a claim based upon injury to the competition between it and direct purchasing franchised dealers who wholesale crash parts (so-called "secondary-line" injury). In support of this argument plaintiff inappropriately relies on Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969). (Pl. Post-Tr. Br. 19-20) In Perkins, the plaintiff, who was both a wholesaler and a retailer, was a direct purchaser of gasoline products from

Standard Oil. Plaintiff claimed that a retail outlet in direct competition with plaintiff was paying a lower price when it purchased through its parent-jobber and parent-wholesaler than the plaintiff paid when it purchased directly from Standard Oil. The Court simply held that the phrase "customers of either of them" allowed a non-favored direct purchaser, such as the plaintiff in the Perkins case, to establish the requisite effect upon competition by showing an injury to the competition at the level of a "customer" of the favored purchaser even though that customer was twice removed (i.e., at the so-called "fourth level") from the supplier. 395 U.S. at 647.

Contrary to plaintiff's contention, Perkins stands for precisely the opposite proposition from that asserted by plaintiff: A direct purchaser may assert a claim for price discrimination favoring remote customers of the supplier who compete with the direct purchaser. It provides no support for the proposition that a remote customer may claim price discrimination favoring direct purchasers. The Court implicitly recognized that Section 2(a) of the Clayton Act imposes a threshold requirement that a plaintiff be a purchaser from the alleged discriminator; having passed this test, a plaintiff is given considerable latitude to show

the level of competition at which the competitive injury was sustained.

The District Court's opinion in Klein v. Lionel Corp., supra, further supports our position. There the Court held that plaintiff had no cause of action under Section 2(a) for two reasons: (a) plaintiff was not a purchaser from the seller but a retailer purchasing from a jobber, and (b) jobbers received the same discounts as chain stores and mail order houses. 138 F. Supp. at 566. Even though the Court found no discrimination at the jobber level, it noted that had a direct purchasing jobber been discriminated against by the seller, the jobber would have standing under Clayton Act, Section 4 and a cause of action under Clayton Act, Section 2(a), but declined to state whether this would also give rise to standing and a similar cause of action in favor of a customer of the discriminated jobber. 138 F. Sup[illegible]t 564. With Judge Rodney's analysis before it, the Court of Appeals in its affirmance held unequivocally that:

> "The decisions of many cases (footnote omitted) have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination." 237 F.2d 13 at 14-15.

In the light of the lower court's opinion, we

submit that the clear import of the Court of Appeals statement is that the question reserved by Judge Rodney must be answered in the negative -- the customer of the disfavored purchaser has no standing.

This requirement that a plaintiff be a purchaser also has been upheld in decisions in District Courts in this Circuit. In United Banana Co. v. United Fruit Co., 245 F. Supp. 161 (D. Conn. 1965), aff'd, 362 F.2d 849 (2d Cir. 1966), the Court quoted with approval the above passage from Klein v. Lionel stating:

> "In order for the plaintiff's claim to have legal merit under the Clayton and the Robinson-Patman Acts, 15 U.S.C. § 13(a), it must be proven that it is an actual purchaser from the defendants before discrimination can be charged." 245 F. Supp. at 168; accord, Baim & Blank, Inc., v. Philco Corp., 148 F. Supp. 541, 543 (E.D.N.Y. 1957).

In F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963) involving an oil company's preferential pricing to direct purchasing service station operators participating in a "gas war" over other direct purchasing service station operators, the Supreme Court noted:

> "It is the very operators of the other Sun stations which compete with McLean who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such purchasers from a single supplier, Sun, would not be injured by that supplier's discriminatory practices." 371 U.S. at 519 (emphasis added).

In Bolick-Gillman Co. v. Continental Baking Co., 206

F. Supp. 151 (D. Nev. 1961), the District Court considered the requirements of standing to assert a secondary-line injury claim by examining the Supreme Court's decision in F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948) and concluded:

> "We have no doubt but that the essence of a secondary-line case is the injury to competing buyers from the same seller. See F.T.C. v. Morton Salt Co., 334 U.S. 37, 45 et seq. (1948), where there are repeated phrases such as 'competitive injury between a seller's customers.' Accordingly, we are satisfied that a plaintiff, when suing to enforce the Act on a theory of injury to secondary-line competition, must allege and show that he was a purchaser from the defendant . . ." 206 F. Supp. at 154.

3. Fred Meyer is not applicable to claims of price discrimination.

In F.T.C. v. Fred Meyer, 390 U.S. 341 (1968) the Supreme Court held that Section 2(d) of the Clayton Act requires that a supplier who gives promotional allowances to a direct buying retailer must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales. 390 U.S. at 358. The most obvious distinguishing feature of Fred Meyer is that it addresses itself only to the meaning of the word "customer" in Section 2(d) of the Act, which is an entirely different provision in both purpose and effect than Section 2(a). As Rowe states:

> "These provisions [Sections 2(d) aand 2(e)] impose more severe legal sanctions than the standards applicable to direct or indirect discrimination in price. Thus a supplier's failure to grant promotional benefits on 'proportionally equal' terms will create a violation irrespective of any adverse impact on competition, and a prima facie unlawful promotional arrangement under Sections 2(d) and 2(e) cannot be 'justified' through all of the provisos available to validate a price discrimination subject to Section 2(a)." Rowe, Price Discrimination Under the Robinson-Patman Act, 364 (1962) ("Rowe").

Indeed the Supreme Court in an earlier opinion pointed out that the "absolute" prohibition of Section 2(d) was designed to create a legal incentive to formulate business transactions in terms of price, so as to facilitate ready comparison and judgment under the flexible criteria governing price discrimination under Section 2(a). F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 65, 68 (1959); Rowe 365. Thus the broader scope given to the word "customer" in Section 2(d) is arguably consonant with this aim of encouraging competition by price rather than promotion.

In fact, the result in Fred Meyer was presaged over twenty years earlier by one leading commentator who emphasized that while an expansive reading given "customer" in Section 2(d) and "purchaser" in Section 2(e) was justified by the special purposes of these sections, it should not be stretched to include "purchaser" in Section 2(a):

> "Under Sections 2(d) and (e) of the Act, requiring proportionally equal promotional allowances and services to all purchasers, an even broader concept of who is a purchaser has been introduced by the Commission. For this purpose all purchasers from wholesalers are seemingly placed in the same category as direct retail buyers. The Second Circuit Court of Appeals has approved this reasonable construction of Section 2(e) in Elizabeth Arden, Inc. v. FTC [156 F.2d 132 (2d Cir. 1946)]. Since any concept of an "indirect" purchaser is necessarily tied in with a basic belief in what the equities require, and these requirements are not the same in subsections (e) and (a), to give the word "purchaser" a broader meaning under (e) seems justified." H. L. Shniderman, "The Tyranny of Labels" -- A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571, 589-90 (1947) (footnotes omitted).

Another fundamental reason for not applying the Fred Meyer decision in the marketing circumstances of the instant case is that in so doing this Court would be vitiating the express proviso in Section 2(a) entitling suppliers to select their own customers which the Supreme Court necessarily found inapplicable under Section 2(d).* It was with respect to claims under Section 2(a) made by entities such

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* While the Supreme Court gave no express consideration to this proviso in the context of Section 2(d), its holding in Fred Meyer requiring the supplier to provide proportionally equal promotional allowances to retailers purchasing through wholesalers necessarily forces suppliers to treat such retailers, for purposes of sales promotion, as their customers thereby rendering inoperative this proviso of Section 2(a) insofar as Section 2(d) is concerned. See also, Shniderman, supra.

as FLM -- undesired and unsolicited customers -- that this proviso was promulgated to protect suppliers such as defendants. This is evidenced by the legislative history of the provision. At the time of the enactment of the Robinson-Patman Act, Congressman Utterback, Chairman of the Conference Committee, explained this proviso in the following manner:

> "The bill contains the proviso already contained in the present Clayton Act permitting sellers to select their own customers in bona fide transactions and not in restraint of trade . . . . 80 Cong. Rec. 9418 (1936).

And its continuing validity has been repeatedly affirmed in subsequent case law. See e.g., F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 66 (1959) (the proviso codifies the rule of United States v. Colgate & Co.); Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202 (10th Cir. 1954); Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939); Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), aff'd, 237 F.2d 13 (3d Cir. 1956); Bird & Son, Inc., 25 F.T.C. 548, 553 (1937).

4. The "indirect purchaser doctrine" is not applicable to give plaintiff standing.

The teaching of the statute, of the legislative history and of the decisional law is that unless plaintiff can establish that it was either a direct or an "indirect"

purchaser from defendants, it lacks standing to assert any cause of action under the Robinson-Patman Act. Plaintiff has admitted throughout this proceeding that it never purchased crash parts directly from defendants but only through franchised dealers. (Stip. 22) Thus, plaintiff could only prevail were it able to invoke the "indirect purchaser doctrine".

This doctrine initially articulated by the Federal Trade Commission* has crystallized in subsequent judicial applications to mean that a purchaser from an intervening seller may be treated as a purchaser from the supplier for purposes of Section 2(a) but only (a) where the supplier desired this purchaser as a customer and engaged in direct solicitations, contractual agreements or other purposeful contacts of an inducing nature, or (b) where sales by the actual seller were so controlled by the supplier that they were in reality sales by the supplier. See e.g., Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), cert. denied, 396 U.S. 901 (1969) (no control over discounts granted by direct purchasing wholesalers); Monroe Auto Equipment Co. v. F.T.C., 347 F.2d 401 (7th Cir. 1965), cert. denied, 382 U.S. 1009 (1966) (contractual relationship with indirect purchaser); Purolator Products, Inc. v. F.T.C., 65 F.T.C. 8 (1964), aff'd, 352 F.2d 874 (7th Cir. 1965), cert.

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* Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937).

denied, 389 U.S. 1045 (1968); Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876 (S.D.N.Y. 1968), aff'd, 405 F.2d 319 (2d Cir. 1969); Klein v. Lionel, 237 F.2d 13 (3d Cir. 1956); K. S. Corp. v. Chemstrand Corp., 198 F. Supp. 310 (E.D.N.Y. 1961); Thompson Products, Inc., 55 F.T.C. 1252 (1959) (approved customers to whom distributors sold); E. Edelmann & Co., 51 F.T.C. 978 (1955), aff'd, 239 F.2d 152 (7th Cir. 1956) (set terms and conditions of resale); Whitaker Cable, 51 F.T.C. 958 (1955), aff'd, 239 F.2d 253 (7th Cir. 1956) (supplier signed and approved contracts with distributors' customers setting terms of sale); Champion Spark Plug Co., 50 F.T.C. 30 (1953) (manufacturer conducted negotiations and set terms and conditions of sale); Dentists' Supply Co. of New York, 37 F.T.C. 345 (1943) (manufacturer solicited customers and suggested retail prices); Luxor, Ltd., 31 F.T.C. 658 (1940) (control over resale prices under state Fair Trade contracts).*

The rationale of the indirect purchaser doctrine is premised on responsibility: the supplier is held responsible to remote purchasers only if he solicited their patronage or so controlled the terms of resale as to make the custo-

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* It is significant that in no reported decision has a private plaintiff successfully recovered damages by invoking the indirect purchaser doctrine. Indeed, the Court of Appeals in Klein concluded that the doctrine should not be applied in cases where the plaintiff seeks, as here, treble damages. 237 F.2d at 15.

mer in reality that of the supplier. As plaintiff recognized (Pl. Post-Tr. Br. 34), the Second Circuit Court of Appeals succinctly stated the limits of this duty in American News Co. v. F.T.C, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962). In the sentence following the passage quoted by plaintiff, the Court stated:

> "If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors." 300 F.2d, 109-10.

In Purolator Products, Inc., 65 F.T.C. 8 (1964), aff'd, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968), the Commission articulated in considerable detail the factors it considered crucial to invocation of the indirect purchaser doctrine:

> "Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at the conclusion are instances of direct contact between the indirect purchaser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation of orders by the manufacturer's salesmen even though the orders are filled by the intermediary and the manufacturer looks to the intermediary for payment, direct negotiations for changes in price, direct policing of the indirect purchaser's resale prices, direct provision of advertising materials, and inspection by the manufacturer to

> insure that the indirect purchaser is fulfilling the terms of its agreement with the manufacturer's distributor or wholesaler." 65 F.T.C. at 32 (emphasis added).

The record is emphatically clear that FLM was not a solicited customer of Ford or a desired component of Ford's distribution system of crash parts. As soon as responsible Ford personnel discovered the true significance of the relationship between FLM and Central Lincoln-Mercury ("Central"), Ford took steps to cancel the second parts code issued to Central. But even if FLM were viewed as an indirect purchaser of defendants while Central possessed the second parts code, that state of affairs ceased in January 1971 with the cancellation of the second code.*

The evidence also reveals plaintiff's awareness that defendants' seller-purchaser relationship was solely with the franchised dealers and not with FLM. Beginning in 1965 when FLM was established, Mr. McKee knew that under defendants' long-established policy FLM could not buy directly from defendants and that FLM could only act as a representative

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* Of course, even assuming FLM was an indirect purchaser of defendants prior to the end of January, 1971, there could be no violation of the Robinson-Patman Act during that period since there was admittedly no price discrimination. Franchised dealers at that time received the same wholesale incentive allowance for sales to FLM as they did for sales to all eligible customers. This policy was not changed until July 1, 1971 (and made effective for sales to FLM only on November 1, 1972). (Nor did this policy change result in any violation of the Robinson-Patman Act as discussed in detail at pp. 47-55, infra.)

of a franchised dealer. (Tr. 137) Hence, Mr. McKee in forming FLM attempted to achieve the best of both worlds: associate FLM as closely as possible with a franchised dealer so as to enjoy the benefits of the allowances accorded franchised dealers, but remain technically separate from such dealer to avoid the attendant responsibilities and related overhead. This is reflected in the agreement dated April 21, 1965 (DX. O) setting forth the relationship between Central and FLM under which FLM sought to use the name, credit and franchise of Central as a cover for its business and to gain the use of a second parts code number obtained in the name of Central from defendants.

Defendants' processing of orders originating with FLM and the delivery of such orders similarly show that defendants never regarded FLM as their customer. Any time FLM placed an order either orally or in writing with defendants it was required to use a parts code number issued to a franchised dealer in the dealer's name. (Tr. 115, 198-199) Defendants looked to the dealer alone for payment; the dealer was directly billed for the parts purchased and the dealer bore any risk of non-payment by FLM. (Stip. 29) Under such circumstances, FLM uniformly acted simply as a representative of a franchised dealer in placing any orders with defendants.

FLM acted in a similar manner when making direct pickup of parts at Teterboro. The record indicates that customers of franchised dealers are often permitted to pickup parts directly from the Teterboro Master Parts Depot provided they have obtained authorization to do so from the dealer. (Tr. 730) FLM held such authorizations and in this respect as well acted simply as a representative of franchised dealers in its dealings with defendants.

The record is equally clear that defendants exercise no control over the resale of crash parts by any of its franchised dealers. The parties have stipulated that all discounts, allowances and credits with respect to sales by defendants of crash parts are credited directly to the franchised dealers to whom such parts are sold by defendants. (Stip. 21) Once the allowance is paid to the franchised dealer, it is free to do with that allowance whatever it chooses. (Tr. 64-5) Against this evidence showing the absence of control by defendants over the terms and conditions of resale, plaintiff has not presented any contrary evidence of the quality found persuasive in the decided cases to invoke the indirect purchaser doctrine.

Specifically, plaintiff has failed to present any evidence indicating:

> -- that defendants effectively control the price charged by any of defendants' fran-

chised dealers to the dealers' customers; compare Purolator, supra

-- that defendants fixed any terms and conditions of resale; or

-- that defendants have controlled the customers to whom franchised dealers may sell; compare Monroe Auto Equip. Co., supra.

At all times, as between FLM and the franchised dealer, the purchaser from defendants was the franchised dealer. To say otherwise would render the person who physically placed the order or picked it up as the customer regardless of who paid or was responsible for payment. Such actions by FLM clearly are not criteria for invoking the indirect purchaser doctrine and no decision so suggests.

5. Denying plaintiff standing would not immunize defendants from liability for any discrimination.

Plaintiff contends that it is the only entity capable of challenging the alleged price discrimination. (Pl. Post-Tr. Br. 23-4). Plaintiff is clearly in error. Assuming for present purposes that defendants have engaged in price discrimination between franchised dealers, the Court's denial of plaintiff's standing to assert such discrimination in no way would mean that defendants are immune from the antitrust laws. Defendants could be sued by their franchised dealers. Indeed, courts have repeatedly held that such direct purchasers are the proper parties to assert

the alleged discrimination in situations such as that hypothesized here. See, Krug v. International Telephone & Telegraph Corp., 142 F. Supp. 230 (D.N.J. 1956); Guyott Co. v. Texaco, Inc., 261 F. Supp. 942 (D. Conn. 1966).*

As the Court stated in Krug:

> "The wholesaler is one of the immediate purchasers from the manufacturer and it would seem to make no difference [to his rights to bring suit] that his injury was not suffered by his inability to compete with others on his own distributive level but by the failure of his customers to meet the competition of another immediate purchaser from the manufacturer." 142 F. Supp. at 236 (emphasis added).

The propriety of this approach is further reenforced by the fact that it avoids the inequitable risk of multiple recoveries encountered by giving non-purchasers standing. Moreover, it comports with the legislative purpose and history of giving discriminated direct purchasers a cause of action under Section 2(a), it respects the proviso entitling sellers to select their customers and it is fully consistent with the large body of decisional law

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* The Federal Trade Commission is also empowered to challenge pricing practices deemed discriminatory under 15 U.S.C. § 13(a), 15 U.S.C. § 13a (Robinson-Patman, Section 3) as well as 15 U.S.C. § 45 (Federal Trade Commission Act, Section 5); see e.g., F.T.C. v. Morton Salt Co., supra.

discussed above.*

One noted expert on the Robinson-Patman Act, former FTC Chairman Kintner, concluded after reviewing Klein v. Lionel, Morton Salt, and Krug, that one of the few basic propositions distillable under the Act is that:

> "Wholesalers can maintain a suit under the Robinson-Patman Act against a manufacturer who employs a dual distribution system. Retailers who purchased the manufacturer's products through wholesalers cannot." Kintner, Robinson-Patman Act Dangers in Distribution and Pricing, 19 Bus. Lawyer 481, 485 (1964) (footnote omitted).

B. Regardless of Whether or Not Plaintiff Has Standing, It Would Have No Cause of Action Under the Robinson-Patman Act.

The principal thrust of plaintiff's contention is that defendants must make such changes in their nationwide system for distributing crash parts as will assure plaintiff what it regards as an adequate level of profitability

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* Plaintiff's suggestion that franchised dealers selling to plaintiff on a "cost plus" basis would lack standing results from a misplaced reliance on dictum in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968). (Pl. Post-Tr. Br. 23-4) This dictum is inapplicable to deny franchised dealers standing under the Robinson-Patman Act to challenge the discrimination hypothesized here. As noted throughout this brief, the resale price for crash parts charged by franchised dealers to their customers is a subject of negotiation between dealers and their customers. Indeed, the "mark-up" by franchised dealers on sales of crash parts to FLM has varied from 2% to 5%. (Tr. 144-6) It has been squarely held that "this variable fixed margin arrangement is not encompassed in the preexisting cost-plus exception of Hanover Shoe." Albertson's Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43, 51 (D. Utah 1973).

in buying crash parts from franchised dealers and reselling them to body shops. Plaintiff argues that there must be a place for it in defendants' distribution system even though its role is basically duplicative of the wholesaler function carried on by the franchised dealers from whom plaintiff buys the parts which it resells. There is neither a right nor a remedy under the Robinson-Patman Act to effect such a result, since under the Act:

- defendants are free to select, in good faith, those customers they desire to have as integral parts of their distribution system; and
- defendants are entitled to grant discounts equally available to all customers thus selected.

1. Defendants are free to select, in good faith, their customers.

Since at least 1919, defendants' distribution of crash parts has been based on selling only to franchised Ford and Lincoln-Mercury dealers. The antitrust laws have long recognized this freedom of the seller to select his customers. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947); United States v. Colgate & Co., 250 U.S. 300 (1919); Loren Specialty Mfg. Co. v. Clark Mfg. Co., 360 F.2d 913 (7th Cir.), cert. denied, 385 U.S. 957 (1966); Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir.

1949); Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), aff'd, 237 F.2d 13 (3d Cir. 1956). As noted earlier, Section 2(a) of the Robinson-Patman Act expressly retains and confirms this right. The Second Circuit Court of Appeals pointed out in Atlanta Trading Corp. v. F.T.C., 258 F.2d 365 (2d Cir. 1958) that:

> "Nothing in the Robinson-Patman Act imposes upon a supplier an affirmative duty to sell to all potential customers. . . . All that the Act requires is that a seller give fair and equal treatment to all those to whom he elects to sell products of like grade and quality." 258 F.2d at 372-373.

Accord, Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939); New Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135 (S.D.N.Y. 1973).

Yet, plaintiff is attempting to use the Robinson-Patman Act as a wedge to force itself into defendants' crash parts distribution system as an undesired and unwanted extra tier -- a use of the statute which is totally at odds with its purpose:

> There is nothing in the [Robinson-Patman] Act that prevents a seller of a commodity from eliminating middlemen from its distributive system and selling its commodity directly to consumers if it wishes to do so; and if it chooses it may distribute a part of its commodity direct and a part through wholesale distribution." Chicago Sugar Co. v. American Sugar Refining Co., supra at 10; see also, Bird & Son, Inc., 25 F.T.C. 548, 553 (1937).

Defendants' customer selection must, of course, be made in good faith. The evidence makes clear that the ready availability of repair and replacement parts is an integral aspect of the effective marketing of new Ford, Lincoln and Mercury automobiles. (Tr. 488-9) Defendants have an established extensive distribution system comprised of some 6,800 franchised dealers nationwide (Stip. 14), including over 430 in the New York metropolitan area alone. (Tr. 737) The decision to distribute crash parts solely through those franchised dealers who are the same entities through whom defendants sell new automobiles, and provide maintenance and repair service for automobiles already purchased, was obviously a reasonable and good faith decision which serves a legitimate business purpose.

At the behest of the Federal Trade Commission, defendants have sought to stimulate competition between franchised dealers and independent repair garages in the repairing of damaged automobiles. Defendants sought to effectuate this objective by utilizing its existing distribution system and offering an incentive allowance on equal terms to all franchised dealers to encourage them to resell eligible crash parts to such independent retailers. It was hoped that by such direct sales by dealers to body shops, the incentive allowance would be reflected by dealers in the price they charged

to retailers giving them acquisition costs competitive with those of a franchised dealer's own body shop.

Plaintiff, in disregard of the purpose of this incentive, demands that defendants offer the incentive on sales by dealers to it simply because it has chosen to wholesale crash parts. The raison d'etre of extending the incentive allowance to crash parts -- direct sales by dealers to retailers at a price commensurate with that paid by dealer body shops -- is undermined if defendants are required to provide an incentive for not selling to retailers and adding a layer of distribution which inevitably results in increased costs.* We submit that the Robinson-Patman Act does not require such a paradoxical result.

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* Plaintiff's footnote contention at p. 40 that defendants' payment of the incentive allowance amounts to compensation for rendering a "specific service" coming within Section 2(d) of the Robinson-Patman Act is specious. Plaintiff attempts to equate a basic economic function -- moving a product from the wholesale level to the retail level -- with a promotional service by ignoring that entitlement to the allowance is based upon the status of the franchised dealer in the distribution hierarchy and not upon the rendering of any promotional service to retailers. It has been specifically held that Section 2(d) does not apply to a seller who charges different prices to different buyers according to the functional level of the buyer. Rutledge v. Electric Hose & Rubber Co., 327 F.Supp. 1267, 1276 (C.D. Cal. 1971), aff'd, 1975 CCH Trade Cas. ¶60,151 (9th Cir. 1975).

2. Defendants are entitled to grant discounts equally available to all their customers.

As among the direct purchasers from defendants (i.e., franchised dealers) there is no discrimination: All are treated equally. Under defendants' distribution system, all franchised dealers performing the wholesaling function are equally able to receive the incentive allowance on eligible parts; likewise, all franchised dealers pay the same price for similar parts when not functioning as wholesalers. Each dealer is free to decide whether it wishes to resell to retailers, on terms negotiated solely between themselves, and thereby receive the discount or not. In either event, dealers making similar decisions are treated identically.

It is axiomatic that discounts equally available to all customers of the supplier do not violate the Robinson-Patman Act. F.T.C. v. Morton Salt Co., 334 U.S. 37 42 (1949) (quantity discounts); Purolator Products, Inc., 65 F.T.C. 8 (1964), aff'd, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968) (customer discounts); Mueller & Co., 60 F.T.C. 120 (1962), aff'd, 323 F.2d 44 (7th Cir. 1963), cert. denied, 377 U.S. 923 (1964) (functional

discounts)*; Viviano Macaroni Co., CCH Trade Reg. Rep. [1967-70 Transfer Binder] ¶18,246 (1968) (freight discounts). Since the only requirement for receiving the incentive allowance is for a franchised dealer to sell eligible parts to an independent body shop or garage, it cannot be disputed that the discount is freely available to all dealers.

3. Plaintiff has no cause of action since it is neither a direct nor indirect purchaser.

Even if plaintiff had standing to assert a price discrimination claim, the fact that FLM is neither a direct nor indirect purchaser from defendants would mean that defendants were not obligated to extend the availability of their discounts to purchases by FLM. This is illustrated by the Purolator case, supra, cited by plaintiff (Pl. Post-Tr. Br. 34-5). There, the FTC asserted that there had been a violation of Section 2(a) of the Robinson-Patman Act in

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* Plaintiff rests its contention that functional discounts must be "cost justified" on an erroneous reading of the FTC's ruling in Mueller & Co., supra (Pl. Post-Tr. Br. 44-7). While such justification may be necessary for some discounts (e.g quantity discounts), functional discounts are permitted because there is no discrimination between competing customers, not because the price difference between customers at different distribution levels has been cost justified. Thus, contrary to plaintiff's representations, the Commission held that cost savings received by the supplier were not relevant to defining a wholesale discount, rather the "character of the resale" was of controlling significance. Therefore, respondent was required to treat equally all of its customers who competed with one another, which is precisely what defendants have done in the instant case.

the sale of automotive parts. Purolator sold automotive filters only to warehouse distributors who in turn sold to jobbers and retailers. Warehouse distributors competed with jobbers in resales to retailers, yet warehouse distributors received a two cent price differential on such sales not enjoyed by jobbers. 65 F.T.C. at 23. The Commission, in considering whether this price differential gave rise to an unlawful price discrimination, concluded that it was essential as a precondition to any violation that the jobbers buying from warehouse distributors were indirect purchasers from Purolator. 65 F.T.C. at 30-6.

The Commission then proceeded to find the following facts to be decisive in applying the indirect purchaser doctrine against Purolator: (1) it had at one time the legal right to control independent warehouse distributor sales; (2) it had supplied warehouse distributors with their sales agreements and adjusted retail price lists; (3) it had directly solicited the jobbers and urged them to maintain prices which for the most part they had done; and (4) it had directly negotiated franchise agreements and changes in price lists to jobbers. 65 F.T.C. at 36. As discussed above, pp. 38-45, supra, defendants' contacts with plaintiff have been insignificant and totally lacking in the nature and character of the encounters which led the

Commission to apply the indirect purchaser doctrine in Purolator.

Implicit in the Purolator decision is the fact that a cause of action lies under Section 2(a) only if there is a price discrimination against a direct or indirect purchaser. Since FLM is neither a direct nor an indirect purchaser from defendants, it has no cause of action under the Robinson-Patman Act.

IV. PLAINTIFF HAS FAILED TO ESTABLISH ANY VIOLATION OF SHERMAN ACT, SECTION 1

A. Plaintiff Has Failed to Present Any Evidence Establishing A Combination or Conspiracy to Prevent Plaintiff from Obtaining Crash Parts*

Plaintiff charges defendants with combining and conspiring between themselves and with franchised Ford and Lincoln-Mercury dealers to prevent plaintiff from obtaining crash parts from franchised dealers. Pl. Post-Tr. Br. 55. Plaintiff has, however, failed to present any probative evidence to support such a claim. Since plaintiff does not distinguish between "combination" and "conspiracy" we frame our response in terms of a claim of conspiracy.

1. No conspiracy between Ford and FMC.

Plaintiff's initial conspiracy claim is that defendants, Ford and FMC, conspired to prohibit plaintiff from purchasing crash parts from franchised dealers. Yet, plaintiff offered no evidence even suggestive of any such conspiracy. The only support now advanced by plaintiff for this claim is a footnote in its brief (Pl. Post-Tr. Br.

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* Plaintiff has not claimed that there is any contract in violation of Sherman § 1 but only a combination or a conspiracy (Pl. Post-Tr. Br. pp. 55-58).

p. 55n) referring to a statement in Rea v. Ford Motor Company, 355 F. Supp. 842 (N.D. Pa. 1973), rev'd on other grounds, 497 F.2d 577 (3rd Cir. 1974) that Ford and FMC "could conspire or combine in restraint of trade within the meaning of the Sherman Act." Even in the Rea case, however, the Court did not find that Ford and FMC did conspire but in its charge to the jury merely referred to Ford and FMC ". . . as an illustration of how a manufacturer could conspire with its subsidiaries." 355 F. Supp. at 864. Thus even if defendants are collaterally estopped from contesting that they could conspire, plaintiff still has failed to prove the actual existence of a conspiracy between Ford and FMC.*

2. No conspiracy between defendants and dealers.

Plaintiff's further conspiracy claim, allegedly between defendants and some unspecified number of franchised dealers, is similarly without support in the record.

Plaintiff claims that in October 1972, J.R. Rose, defendants' New York District Sales Manager - Ford Parts

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* In point of fact the acts of which plaintiff complains were unilateral acts of either Ford or FMC, never both entities. FMC did not even begin doing business until July 1, 1970 and for the remainder of the period covered by the record only FMC was involved in the events relevant to this case.

Division, advised Mr. Pollack, the dealer principal of Atlas Lincoln-Mercury,* to cease selling crash parts to FLM. Pl. Post-Tr. Br. 56. Plaintiff relies solely on a hearsay, self-serving account by Mr. McKee, a principal of FLM, of a conversation he had with Mr. Pollack. (Tr. 169, 175) Defendants made a timely motion to strike this testimony (Tr. 169) and promptly placed Mr. Rose on the stand who unequivocally denied ever telling Mr. Pollack that Atlas could not sell crash parts to FLM. (Tr. 671) Significantly, plaintiff did not call Mr. Pollack as a witness, even though he was readily available, had been listed by plaintiff as a prospective witness and could have refuted Mr. Rose's denial had it been untrue.

The only other evidence plaintiff advances as allegedly indicating a conspiracy is a letter dated November 1, 1972, written by Mr. Rose to M.L. Hughes, Northeastern Regional Sales Manager - Ford Parts Division. (PX. 32) In this letter, Mr. Rose simply acknowledged that pursuant to the terms and conditions set forth in defendants' Policy and Procedure Manual, FLM was not an eligible customer for whom wholesale incentive could be claimed. (PX. 32, p. 1). Mr. Rose

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* Plaintiff erroneously identifies Mr. Pollack as the dealer principal of Central Lincoln-Mercury. Central had, however, terminated operations in July 1972 and was replaced by Atlas Lincoln-Mercury at the time of the purported conversation (Stip. 22(a)).

expressed his personal opinion that FLM should not be permitted to establish ". . . a similar working relationship with another dealer or dealers . . ." which he noted had involved the picking up of parts without written dealer authorization, improper claims by dealers for wholesale incentives and the use of an improperly issued second dealer's parts code. (PX. 32, pp. 2-3) Nothing in this letter gives the least suggestion that Mr. Rose thought FLM should be prevented from purchasing crash parts. Moreover, plaintiff's argument that it has been prevented from obtaining crash parts is effectively refuted by the plain and undisputed fact that FLM enjoyed record sales of Ford, Lincoln and Mercury crash parts for fiscal 1973 (Stip. 30).

Against this factual background, plaintiff's attempted analogy of the instant case to United States v. General Motors Corp., 384 U.S. 127 (1966) is totally inappropriate. There, in forcing franchised dealers to stop selling automobiles to so-called "discounters", General Motors personnel had direct confrontations with errant dealers, threatening to "knock their teeth down their throats" if they continued selling to discounters. 384 U.S. at 136. They also engaged in joint policing efforts

with franchised dealers by using "shoppers", persons disguised as discounters, who would entice dealers to sell to them and then force succumbing dealers to repurchase, often at a substantial loss. 384 U.S. 137-8. These tactics insured the complete cessation of discount sales. In the words of the Court, General Motors, unlike the present case, presented a "classic conspiracy in restraint of trade." 384 U.S. at 140.

Plaintiff has failed to prove either a conspiracy between Ford and FMC or a conspiracy between defendants and their dealers. Such a failing is fatal under Section 1 of the Sherman Act which requires as a basic element proof of a "contract combination or conspiracy" (15 U.S.C. § 1).

B. Defendants' Wholesale Incentive Allowance Does Not Contravene the Principles of Schwinn

Assuming arguendo that plaintiff could prove the requisite contract, combination or conspiracy, defendants have in no way violated the principles of Schwinn. In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Supreme Court held that once a seller parted with title to its products, it could not, by agreement, restrict the persons to whom its customers might resell those products. The Court found that Schwinn prohibited its dealers from

selling outside their assigned area and to anyone other than franchised Schwinn dealers. Failure to comply with these resale restrictions subjected the franchise to cancellation by Schwinn. The Court concluded that such vertically imposed restrictions on the customers' right to resell were violations of Sherman Act, Section 1.

The crucial elements found by the Court in Schwinn to amount to violation of Section 1, and absent in the instant case, are:

(1) Absolute and unconditional control by the seller over the customers with whom its dealers and distributors could deal; (388 U.S. at 371)

(2) Firm and resolute enforcement of these restrictions by the threat of termination of the seller's relationship with its dealers and distributors; (388 U.S. at 372)

(3) Resulting in an adverse competitive effect at the retail level.

1. Defendants exercise no control over the customers to whom franchised dealers resell automotive parts.

In Schwinn, the prohibition against sales to certain classes of customers was absolute and unconditional. Schwinn's retailers and distributors agreed with Schwinn not to make the prohibited sales and their franchises were subject to cancellation if they did not abide by their agreement. Contrast this

with the situation in the present case. The evidence establishes that franchised dealers are free to sell automotive parts to anyone, anywhere and at any price. (PX. 9, 112, DX. G, Tr. 520-1) Nor is there anything in defendants' Sales and Service Agreement with their dealers that restricts the right of dealers to choose the customers with whom they will deal. (See PX. 112, ¶ 3(a))

FLM contends, however, that the refusal of defendants to pay wholesale incentives to their dealers on sales to FLM, as defendants formerly had done under the pre-July 1971 policy, has the effect of controlling the customers to whom dealers may sell. Perhaps the most striking refutation of this contention is plaintiff's own admission that its sales have increased each year since its inception and that it enjoyed record sales of $798,947 in fiscal 1973 -- the year defendants' policy modification was made effective to sales to FLM. (Tr. 135, Stip. 30) Thus plaintiff's claim that this policy change restrained sales by franchised dealers to FLM is contrary to its sales record.

However, if plaintiff's contention that functional discounts constitute a per se violation were to be accepted, defendants would logically be required to return to a

"one-price system".* The Court could be ringing the death knell for functional or trade discounts. Plaintiff acknowledged that its position would have this effect on "dual distribution" systems (Pl. Post-Tr. Br. at 53-4)** where the same customer resells at different levels, but plaintiff's brief fails adequately to explain why the logic of its position would not similarly mandate a one-price system where different customers resell at different levels. The fact is that the purported evil plaintiff perceives is the use of any differential pricing based on the status of the customer in the supplier's distribution hierarchy.

We submit that the Court's acceptance of plaintiff's contention could destroy functional pricing systems which have long been recognized as legitimate and proper. Van Cise explains the economic necessity of such differentials as follows:

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* As was noted in defendants' earlier memorandum on the Principles of Schwinn at pp. 11-13, since defendants would still have the right to refuse to deal with plaintiff, the creation of a "one-price system" would not improve plaintiff's competitive position.

** Plaintiff's footnote at p. 54 suggesting that franchised dealers "could just as easily" use station operators as conduits is absurd. The increased volume of sales by dealers to such operators alone would alert an auditor to such practices.

> "there is no dispute in trade circles, however, as to why in fact these differences in price must exist. Unless the manufacturer received a lower price than is given to his distributor customers, he cannot afford to resell to them. Similarly the wholesaler must receive the next lowest price if he is to be able to resell to retailers. And a retailer must obtain a lower price than a consumer if he is profitably to resell to consumers. These price differences, in fact, are thus afforded by the trade -- not theoretically as payments for savings made or services rendered -- but more realistically as esential economic incentives to make it possible for these classes of customers to survive and function. So long as a seller wishes to sell to more than one of those classes, therefore, he must usually provide these differentials in price." Van Cise, How to Quote Functional Prices 82, Antitrust Law Symposium, N.Y. State Bar Assoc. (CCH 1957)

Schwinn should not be distorted to require such a result so clearly at odds with the basic economic principles underlying the distribution of manufactured goods. This was recognized in a very recent opinion by Judge Wyatt in United States v. Revlon, Inc., 62 Civ. 2219 (S.D.N.Y. March 7, 1975), where the Court concluded inter alia that a discounting policy similar to defendants' in the instant case did not violate Schwinn.

In Revlon, the government challenged under Section 1, among other things, Revlon's system of giving so-called "beauty jobber customers" special discounts if they resold to beauty shops and beauty schools. Prior to 1963, Revlon

required beauty jobbers with whom it dealt to enter into agreements which included provisions that the jobbers would only resell to beauty shops and beauty schools and that they would not resell to outlets of which Revlon disapproved. (Slip Opinion at 15) Failure to comply with these restrictions subjected beauty jobbers to cancellation of their distribution contracts. (Slip Opinion at 16) Notwithstanding these restrictions, a number of jobbers sold to non-beauty shop retailers, to consumers and to other jobbers. (Slip Opinion at 17-28) In 1963, Revlon entered into new agreements with its jobbers revoking the pre-1963 contracts and providing instead that each jobber was free to sell to anyone, but if any jobber resold to other than beauty shops or beauty schools he was to notify Revlon and repay to Revlon the "functional discount" which had been allowed to him; and that if he resold to other than a beauty shop or beauty school without notifying Revlon, he was to pay to Revlon the "functional discount" plus 10% (for "administrative and investigative expenses") of the sales price of the products so resold. (Slip Opinion at 29)

The Court held that the pre-1963 contract provisions clearly violated Schwinn and enjoined Revlon from reverting to them, but the Court did not enjoin Revlon's post-1963 provisions. (Slip Opinion at 63) In language particularly

apt to the instant case, the Court noted the legitimate purpose served by Revlon's post-1963 discount policy:

> "To encourage the jobber, he is given the largest of the discounts on [Revlon's] cosmetics; in effect, he is being paid for promoting Revlon with beauty shops. If he sells to drug stores or at retail, the jobber is not performing his function and has obtained his discount improperly. Moreover, if he sells to another jobber or to a drug store, he is destroying the impression which Revlon created for its product. As noted, Revlon carefully chooses both its jobbers and its retailers. A sale by a jobber to another jobber or to a retailer would always (or almost always at least) be to a jobber or retailer to whom Revlon would not itself sell, this because that jobber or retailer was not up to Revlon's standards." (Slip Opinion at 60-1, emphasis added)

2. Defendants have not been "firm and resolute" in enforcing any customer restrictions.

In Schwinn, the Court found that Schwinn had been "firm and resolute" in enforcing customer limitations by threatening to terminate dealers violating this restriction. 388 U.S. at 372. The Second Circuit Court of Appeals has held that evidence of "firm and resolute" enforcement of the restriction is required to invoke the Schwinn doctrine. Janel Sales Corp. v. Lanvin Parfums, Inc., 397 F.2d 398, 406 (2d Cir.), cert. denied, 393 U.S. 938 (1968). This requirement has been followed by District Courts in the Second Circuit as well, United States v. Eaton Yale & Towne, Inc.,

1972 CCH Trade Cas. ¶ 73,889 (D. Conn. 1972); Ansul Co. v. Uniroyal, Inc., 306 F.Supp. 541, 559 (S.D.N.Y. 1969).

There is absolutely no evidence that defendants threatened to terminate any franchised dealer who sold automotive parts to FLM. Nor is there any credible evidence that defendants ever instructed, requested or even suggested to any franchised dealer that it not sell to FLM. (Tr. 520-3, 671) Again, FLM's record sales after the change in defendants' wholesale incentive policy rebuts any contention that defendants enforced any resale restrictions against FLM.

Under defendants' incentive policy, dealers are not penalized by selling to FLM. In fact, franchised dealers pay the same price when they resell to FLM as when they use such parts in their own garages or sell to other franchised dealers. Rather, the incentive policy seeks to encourage franchised dealers to resell to retailers, not another wholesaler. Any claim that payment of this incentive amounts to a "firm and resolute" enforcement of customer restrictions both distorts the purpose of the incentive and ignores the realities of its application.

3. Defendants' incentive policy stimulates intraband competition at the retail level.

The basic anti-competitive evil flowing from customer restrictions is a reduction in intraband competition. See

Areeda, Antitrust Analysis ¶ 521 (1967). In Schwinn the government claimed that Schwinn's customer restrictions limited intraband competition at the retail level. 388 U.S. 369-70.

In contrast, defendants' wholesale incentive policy, extended in 1968 to crash parts at the behest of the Federal Trade Commission (DX. CS-CV), was designed to stimulate intraband competition at the retail level. By giving the incentive allowance to franchised dealers who resold directly to independent body shops and other retail repair operations, it was hoped that the incentive would be reflected in lower resale prices to these retailers thereby giving them acquisition costs comparable to those incurred by direct purchasing dealers when retailing similar parts themselves. (Tr. 476-7) This results in enhanced intraband competition at the retail level, quite unlike the policy practiced by Schwinn.

Reinstituting the wholesale incentive allowance for sales by dealers to FLM would not stimulate intraband competition at the retail level. Rather, it would encourage an additional layer of intermediaries in the distribution system resulting in increased costs to be borne by retailers and ultimately by consumers. FLM must purchase defendants' parts from franchised dealers at some mark-up over the dealer's costs. Even if the incentive allowance was paid on sales to FLM, FLM

would invariably pay more for the parts than the franchised dealers. (Tr. 143-7)* Unless FLM absorbed this differential, it would have to resell to retailers at a higher price than franchised dealers, thereby having a marginal, if any, effect on intraband competition. Even if FLM should on occasion absorb this differential, it does not make economic sense to require defendants to recognize an unwanted extra tier in its distribution system and to discriminate in favor of franchised dealers not performing the wholesaling function by granting them the incentive allowance on sales to FLM at the expense of those dealers performing the function and selling directly to retailers.

We submit that Schwinn does not mandate any such result. As the Court stated in Schwinn, the focus of inquiry is whether the "effect upon competition in the market place is substantially adverse." 388 U.S. at 375. Here defendants' incentive system as applied to crash parts has a direct pro-competitive effect on intraband retail competition.

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* This is borne out by the evidence that FLM has always paid at least 2% over the cost of the parts to its supplying dealers. (Tr. 144)

V. THE RECORD IS DEVOID OF ANY EVIDENCE THAT DEFENDANTS VIOLATED SHERMAN ACT, SECTION 2.

Plaintiff's claim that defendants have violated Sherman Act, Section 2 (15 U.S.C. § 2), has been advanced as a belated pro forma contention. Nowhere in the complaint was it alleged how defendants had violated Section 2. It was only at the eleventh hour, on the eve of trial, in a string of contentions that plaintiff offered the bald assertion "that the defendants have attempted and conspired to monopolize and control the after market in Ford crash parts, and the defendants have used their power as the manufacturer of these parts in their effort to control and monopolize these crash parts in the after market." (Pl. Contentions ¶ 6, September 20, 1974)

Plaintiff at trial and in its Post-Trial Brief has added nothing to this recital of a Section 2 litany. It made no effort to sustain even the most rudimentary elements of claims under Section 2 of an attempt to monopolize or a conspiracy to monopolize, such as: (1) specific intent and (2) product and geographic markets.

A. The Record is Devoid of any Evidence Supporting Basic Elements of an Attempt to Monopolize or Conspiracy to Monopolize

1. There is no showing that defendants had a specific intent to monopolize or to conspire to monopolize.

The seminal action of defendants of which plaintiff complains was the change in the policy for allowances of wholesale incentive in July 1971. However, merely establishing that a policy change was made does not constitute proof of a Section 2 violation. Rather, plaintiff is then met with the requirement, which it cannot meet, of proving that in making such a policy change defendants had the specific intent to control or exclude competition from a relevant market. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Griffith, 334 U.S. 100 (1948); Independent Iron Works, Inc. v. United States Steel, 332 F.2d 656 (9th Cir. 1963); United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"); United States v. Chas. Pfizer & Co., 245 F. Supp. 737 (E.D.N.Y. 1965).

Plaintiff has sought to circumvent that burden by substituting a few flat assertions for probative evidence. Plaintiff asserts that defendants have attempted to drive plaintiff out of business and that defendants have cut off the supply of crash parts to FLM. (Pl. Post-Tr. Br. 63)

But the record is barren of any evidence to support such contentions. For example, the 1971 changes in policy were not even enforced against plaintiff for more than 15 months. In fact, the record actually shows that FLM continues to have ready access to and continues to purchase defendants' crash parts to this day. (Tr. 135) Nor, as we have set forth above (pp. 57-60, supra) is there any probative evidence that any one in the Ford Parts Division ever suggested that franchised dealers refuse to sell parts to FLM.

In addition, the 1971 change in the wholesale incentive allowance program was considered and made applicable in relation to a whole spectrum of automotive parts, not just crash parts which constitute only a small percentage of total parts. Since this policy modification changed the eligibility requirements for sales by franchised dealers for all kinds of automotive parts on a nationwide basis, it is absurd to suggest that the change was made to drive FLM out of business.

As discussed in detail at pp. 15-19, supra, the record amply demonstrates that the modification in July 1971 of this wholesale incentive allowance policy was motivated by legitimate business aims. The case law is emphatic that conduct motivated by such legitimate aims

precludes a finding of the specific intent essential to sustain a claim of attempt to monopolize or conspiracy to monopolize under Section 2. See e.g., Times-Picayune Publishing Co. v. United States, supra; Independent Iron Works, Inc. v. United States Steel, supra; United States v. Chas. Pfizer & Co., supra.

We submit that this evidence conclusively establishes a valid business justification for the policy change in July 1971 every bit as strong as that presented in the leading Times-Picayune case, supra, involving a change in defendant's policy to mandatory "unit" pricing. There, the Supreme Court found that the policy change was justified as a move to counteract competition by defendant's competing newspapers and because the policy had been long established in the industry. Even though the effect was to substantially diminish the amount of advertising carried by defendant's competitor, the Court concluded:

> "Since we have viewed that step as predominantly motivated by legitimate business aims, this record cannot bear out the specific intent essential to sustain an attempt to monopolize under Section 2." 345 U.S. at 623.

It follows from the foregoing that plaintiff has failed completely to show the requisite specific intent to monopolize or to conspire to monopolize.

2. There is no showing of relevant product and geographic markets.

Putting blanket assertions by plaintiff's counsel to one side, the record is devoid of adequate evidence to establish the relevant product and geographic markets which plaintiff has the burden of proving. See e.g., United States v. Grinnell Corporation, 384 U.S. 563 (1966); Walker Processing Equipment, Inc., v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) ("duPont-Cellophane"); Science Products Co., Inc. v. Chevron Chemical Co., Inc., 384 F.Supp. 793 (N.D. Ill. 1974); United States v. Chas. Pfizer Co., supra. This puts defendants at a disadvantage in addressing this point. Presumably, defendants would be justified in merely pointing to the failure on the part of plaintiff to establish another essential element in support of its attempted monopolization claim and leave it at that. However, we believe it may be of assistance to the Court briefly to examine the alternative product and geographic markets for which an argument conceivably might be made and to demonstrate that in none of these markets is there a risk of monopolization by defendants.

(a) Conceivable Product Markets.

The relevant product market generally is defined to be that area of goods or services in which the product

or products offered by defendants effectively compete. See e.g., United States v. Grinnell Corp., supra; duPont-Cellophane, supra. The product market in which plaintiff competes is only incidental to this determination. Nevertheless, throughout these proceedings and in its Post-Trial Brief, plaintiff's counsel has repeatedly made the blanket assertion that the relevant product is Ford manufactured crash parts. But the Supreme Court has warned that determinations of relevant product markets must be in accordance with the realities of the market place. See, United States v. Grinnell Corp, supra; see also, Telex Corp., et al. v. International Business Machines Corp., 1975 CCH Trade Cas. ¶ 60,127 (10th Cir. 1975) ("Telex v. I.B.M.").

All Automobiles

Keeping this stricture in mind, it is submitted that the most rational choice of relevant product market is automobiles, not Ford crash parts. The evidence indicates that it is at this level that defendants' products effectively compete. Once an automobile is purchased, it is a fait accompli which crash parts may be purchased. If one purchases a Ford obviously Ford crash parts will be used if the occasion arises, likewise if one purchases a Chrysler, Cadillac or Volkswagen. The dynamics of the

market place as to crash parts operates at the time the initial decision to purchase a particular brand of automobile is made. It is then that considerations of price, availability, ease of replacement and quality of crash parts may have significance in the purchaser's mind as he chooses between competing brands of automobiles. As the record indicates, defendants do not engage in promotion of crash parts as such. The volume of defendants' crash parts sold is primarily dependent upon the quantity of defendants' cars sold coupled with such non-economic factors as the number and severity of accidents. (Tr. 485)

Additionally, Mr. Rowlands testified that a major reason for not applying the wholesale incentive allowance to certain crash parts was because other competitors (such as American Motors, Datsun, Toyota and Volkswagen) in the automobile market were not granting similar allowances. (Tr. 574) To have done so would have given defendants an additional cost of doing business and placed them at a competitive disadvantage in selling compact automobiles. (Tr. 576)

For these reasons, the product with which defendants effectively compete is the automobile and it should be the relevant product market. Because the record lacks

any evidence that defendants have attempted to monopolize the sale of automobiles at the wholesale level, plaintiff's attempted arguments on these grounds also have to be dismissed.

All Automotive Parts

Should automobiles be rejected as the relevant market in favor of a lesser market, it might be argued that the sale of automotive parts, not just crash parts, at the wholesale level should be the relevant market. It is undisputed that the 1971 wholesale incentive policy which plaintiff has challenged applies equally to a large number of parts of which only a fraction are crash parts. (Tr. 613-5) Further, Mr. Rowlands testified that a major reason for instituting the wholesale incentive allowance policy was to make defendants' franchised dealers competitive with General Motors or Chrysler franchised dealers in the wholesaling of automotive parts. (Tr. 564-73) This is obvious in the case where defendants' branded parts are directly competitive with those of General Motors and Chrysler, but it is no less true as to automotive parts not directly competitive.

The record reveals that franchised dealers must make substantial investments in facilities and inventory

in a large number of parts, competitive and non-competitive, in order to function effectively as wholesalers of automotive parts (Tr. 564) To encourage this investment in a full-line of parts, the wholesale incentive allowance policy was devised so that the Ford franchised dealer would be competitive with the General Motors or Chrysler dealer in providing wholesale service in automotive parts. (Tr. 565-6)

This concept of the relevant market is further buttressed by the fact that a major reason defendants raised their wholesale incentive allowance to 25% was to respond to a similar increase by General Motors. (Tr. 573) Moreover, as noted earlier, the predominant factor in not offering the allowance on certain parts (e.g., parts for small cars) was that competing automobile manufacturers did not offer it on similar parts. Thus, the record is replete with evidence that the automotive parts market is responsive to changes in wholesale allowances offered by the respective manufacturers. Such price sensitivity is a highly significant factor in determining the relevant product market. See, United States v. Grinnell Corp., supra; duPont-Cellophane, supra; Telex v. I.B.M., supra.

If automotive parts were chosen as the relevant product market, it is clear that the danger of monopolization

would be so minimal as to be fanciful in the face of such competitors as General Motors and Chrysler and the numerous smaller manufacturers, as well as independent wholesalers and jobbers which are not franchised dealers.

All Crash Parts

If the product market were narrowed to crash parts, we submit that it should in no event be limited to crash parts manufactured or sold solely by defendants. First, evidence was introduced that used parts procured from junkyards are an alternative source of crash parts to those produced by defendants. (Tr. 697-8) DuPont-Cellophane clearly establishes that substitutes having essentially the same end-use as the product in question should be included in the same product market. Since junkyard parts may be used in place of new crash parts, they do have the same end-use and must be included in the relevant product market. Plaintiff has the burden of establishing the extent of defendants' share of the relevant product market. See, Telex v. I.B.M., supra; Science Products Co., Inc. v. Chevron Chemical Co., Inc., supra. Thus, plaintiff's failure to provide evidence on the significance of junkyards as an alternative source, (and the source cannot be presumed to be insubstantial) leaves an irreparable gap in its case.

In addition, all crash parts of all manufacturers should be included in the product market. The evidence discussed above relating to the cross-responsiveness of defendants' wholesale incentive allowance policy to the respective policies of their competitors, applies to crash parts as well. (Tr. 573-7) Since the price of defendants' crash parts, as reflected in their eligibility for the incentive allowance, is sensitive to the price of crash parts of defendants' competitors, there is effective competition at the wholesale level among all automobile manufacturers.

It is clear that if the relevant market is viewed as crash parts including parts available from junkyards, defendants again have not been shown to have sufficient market power to support a claim of attempted monopolization.

Ford Crash Parts

In the event the product market were further constricted to include only defendants' crash parts, such a market would have to include both incentive bearing and non-incentive bearing parts. There is no justification for limiting the market to only incentive bearing crash parts. As Mr. McKee himself testified, the fact that a part is incentive bearing has no effect whatsoever on his decision to stock that part. (Tr. 701) Thus, it will be noted that even though plaintiff thereby disclaims attaching any

significance in the market place to the wholesale incentive allowance, plaintiff still contends that it is this very policy through which defendants are attempting to monopolize the wholesaling of crash parts.

In any event, even if the relevant product market is narrowed to only defendants' crash parts, defendants still lack sufficient power over this market to meet the test of the law. Less than 48%* of defendants' crash parts are incentive bearing. Assuming arguendo that defendants had the requisite intent and control over incentive bearing parts necessary to sustain an attempted monopolization claim, no court has held that control of 48% of the market is sufficient to present a risk of monopolization. For cases holding such a risk existed, see e.g., Kansas Star Co., v. United States., 240 F.2d 643 (8th Cir. 1957), cert. denied, 352 U.S. 923 (1957) (newspaper company controlled approximately 95% of morning and evening newspaper circulation); Alcoa, supra (90% control of manufacture and sale of domestic primary aluminum ingots); United States v. Grinnell Corp., supra (87% of the accredited central station alarm

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* Mr. Rowlands testified that approximately 4,800 of 10,100 crash parts are incentive bearing, which equals 47.54% of the total crash parts produced by defendants. (Tr. 614-5) While, of course, defendants decide which Ford parts will be incentive-bearing, such decisions are largely based upon market factors over which defendants exercise no control, such as the practices of defendants' competitors of providing or not providing incentives on similar parts. (Tr. 573-6)

service business controlled by defendant); American Tobacco Co. v. United States, 328 U.S. 781 (1946) (80% control of comparable cigarette market). In the landmark Alcoa case, supra, Judge Learned Hand stated that "it is doubtful whether 60 or 64% would be enough [to present a risk of monopolization]". 148 F.2d at 424.

(b) Conceivable Geographic Markets

Plaintiff erroneously states that the geographic market is not a factor in its Sherman Act, Section 2 claim, and then proceeds summarily to state that the geographic market would be the "metropolitan New York area and its outlying suburbs." (Pl. Post-Tr. Br. 60n.) It has been stipulated, however, that defendants sell their products (automobiles, automotive and crash parts) throughout the United States to approximately 6,800 franchised dealers, 1,000 direct account warehouse distributors and 40 national accounts. (Stip. 12) The evidence establishes that the 6,800 franchised dealers are able to receive the wholesale incentive allowance for sales of automotive parts to eligible customers. Thus, realistically, there are at least 6,800 competitors nationwide at the wholesale level of defendants' automotive parts, including crash parts.

Even assuming that the geographic market is the New York metropolitan area, Mr. Hackewicz, General Manager

of defendants' Master Parts Depot at Teterboro, testified that his facility provided fast moving (Class "A") and slow moving (Class "B") automotive parts (including crash parts) to approximately 436 franchised dealers located in this area. (Tr. 737-8) Here too, these 436 franchised dealers are competitors of each other in the wholesaling of crash parts, since each is qualified to receive the wholesale incentive allowance when they sell eligible parts to eligible customers.

Thus, assuming arguendo that the relevant product market is defendants' crash parts, whether the geographic market is viewed as national or limited to the New York metropolitan area served by defendants' Master Parts Depot, the fact remains that there are hundreds of vigorous competitors at the wholesale level of which FLM was only one. Since plaintiff has identified no more than four of these competitors over which it claims that defendants exercised control (Pl. Post-Tr. Br. 63, Tr. 179), the claim that defendants are attempting to monopolize again borders on the ludicrous.

B. The Record is Devoid of Any Evidence of An Attempt by Defendants to Monopolize A Relevant Market

The section of plaintiff's Post-Trial Brief dealing with attempted monopoly fails to distinguish between

attempted monopoly and monopolization (Pl. Post-Tr. Br. pp. 58-65), two separate and distinct violations under Section 2 of the Sherman Act. Plaintiff's argument is further jumbled by numerous references to certain elements relating to conspiracy to monopolize.* But whatever the analysis, it is clear that plaintiff has failed to prove any violation of Section 2.

The major thrust of plaintiff's argument appears to be directed toward attempted monopoly. Prior to its Post-Trial Brief, plaintiff never raised any issue of monopolization and its untimely argument at this late date cannot obscure its lack of substance. The only claim of monopolization made by plaintiff (and now for the first time) is that defendants have extended (attempted or conspired to extend) a natural monopoly of the manufacture of Ford crash parts to the wholesale distribution of such parts. Yet the only suggested evidence in the record of any such extension is the fact that there are four dealer development dealers (out of 436 dealers in the geographic market identified by plaintiff). Even assuming defendants' control of these dealer development dealers (an assumption not supported by any evidence), control

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* Conspiracy to monopolize was discussed by plaintiff in its Post-Trial Brief at pp. 55-58. Defendants' discussion thereof appears at pages 88-91, infra.

of less than one percent of the market is a totally inconsequential extension of any natural monopoly. The monopolization claim on its face is without substance.

Plaintiff's purported evidence of an attempt by defendants to monopolize seems to reduce itself to wholly conclusory statements by counsel in their Post-Trial Brief that defendants are "preventing competition" (p. 62) and "attempting to monopolize the after-market in the wholesaling of crash parts" (pp. 63, 64). Plaintiff ignores that it has the burden of proving an attempt to monopolize by a preponderance of the evidence, United States v. Grinnell Corp., supra; United States v. duPont de Nemours & Co., supra; Interborough News Co. v. Curtis Publishing Co., 127 F.Supp. 286 (S.D.N.Y. 1954), aff'd, 225 F.2d 289 (2d Cir. 1955), which entails a clear demonstration, in addition to proving (a) that defendants had a specific intent to monopolize and (b) relevant product and geographic markets, that there is a "dangerous probability" of monopoly by defendants. Plaintiff also has failed to establish this "dangerous probability".

The classic statement of this requirement was articulated by Mr. Justic Holmes in Swift & Co. v. United States, 196 U.S. 375 (1905);

> "Where acts are not sufficient in themselves to produce a result which the law seems to prevent, -- for instance, the monopoly, -- but requires further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring them to pass is necessary in order to produce a dangerous probability that it will happen." 196 U.S. at 396 (emphasis added).

In order to make this showing, a plaintiff must establish that the defendant had sufficient market control to make it likely that it can achieve such monopoly. This entails a presentation by plaintiff to the Court of evidence of the market power possessed by the defendants against whom the charge is made. See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., where the Supreme Court declared:

> "To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, [it is] . . . necessary to appraise the exclusionary power . . . in terms of the relevent market for the product involved. Without a definition of that market there is no way to measure [defendant's] ability to lessen or destroy competition." 382 U.S. at 177.

Clearly, therefore, it is necessary, in addition to defining the relevant market, to show the manner in which the defendants are likely to succeed in controlling that market and destroying their competition. Here too, plaintiff has totally failed to offer relevant evidence.

As with its purported monopolization claim, plaintiff appears to argue that there is a dangerous probability that defendants will be able to extend a natural monopoly in the manufacture of Ford parts to the wholesale level through their incidental and temporary stock ownership interest in two dealerships (Thomas Motors, Inc. and Parkview Lincoln-Mercury, Inc.). (Pl. Post-Tr. Br. 63, Tr. 167-168) In support of this argument plaintiff relies on Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971), which are clearly inapposite to the facts of the instant case. First, in each of these cases the relevant product and geographic markets had been well defined by the respective plaintiffs, a fact noticeably lacking in the instant case. Second, within the relevant product and geographic markets it was established that the defendant-manufacturers were vertically integrated down to the retail level and enjoying a dominant position in their respective product and geographic markets at the wholesale level. In such circumstances, the courts found that there existed a dangerous probability that defendants could extend their

monopoly at the manufacturing level to the wholesale level which they already dominated.

Such situations are in sharp contrast to the facts of the instant case. Here the record is devoid of any evidence that defendants' "dealer development" program for launching franchised dealers involves any infringement upon the independence of action of franchised dealers. Even assuming that defendants did control the two "dealer development" dealerships mentioned by plaintiff, and further, even making the dubious assumption that the relevant product market were Ford manufactured crash parts, it would still have to be considered in the light of the facts that defendants have approximately 6,800 franchised dealers nationwide (Stip. 14) and 436 in the New York metropolitan area (Tr. 737) all eligible to compete as wholesalers of Ford crash parts. Thus, there is no proof of any "dominance" that could create a dangerous probability of monopolization at the wholesale level.

C. The Record is Devoid of Any Evidence of A Conspiracy to Monopolize

The Court noted during the course of the trial that plaintiff had so far failed to present any evidence indicating involvement by defendants in any conspiracy to monopolize. (Tr. 165-8) Nor did plaintiff thereafter remedy this deficiency.

In addition to the lack of proof of specific intent, there is no evidence of the other rudimentary elements of a conspiracy to monopolize, namely, (a) existence of a conspiracy and (b) overt acts in furtherance of the conspiracy.

1. Plaintiff has failed to show the existence of a conspiracy involving defendants.

Proof of the actual existence of a conspiracy is essential to support a claim of conspiracy to monopolize under Section 2 of the Sherman Act. (Tr. 166) See also, American Tobacco Co. v. United States, supra; United States v. Morgan, 118 F.Supp. 621, 634 (S.D.N.Y. 1953). Although the word "conspiracy" is not defined in Section 2, there can be no disagreement as to its meaning. Plaintiff had the burden of showing either a combination to accomplish a lawful act by unlawful means or an unlawful act by lawful means. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 293 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899); National Fireproofing Co. v. Mason Builders' Association, 169 Fed. 259, 264 (2d Cir. 1909).

Plaintiff has utterly failed to establish a conspiracy either between defendants themselves or between defendants and their franchised dealers (see pp. 56-60, supra). The record shows that the wholesale incentive allowance paid franchised dealers was in no way affected by the price or terms

on which they resold crash parts. (Tr. 520) Nor is there competent evidence that defendants ever directed or suggested in any manner to their franchised dealers that they refuse to sell crash parts to FLM. Indeed, the probative evidence, as we have noted, is directly to the contrary. (Tr. 521, 671) Putting plaintiff's bare allegations of conspiracy to one side, there has been a complete failure to present a scintilla of evidence independently establishing the existence of a conspiracy.

2. Plaintiff has failed to show any overt act in furtherance of a conspiracy.

Assuming arguendo the existence of a conspiracy, in order to prove a violation of Section 2 resulting from a conspiracy to monopolize, plaintiff also must establish that there was at least one overt act performed in furtherance of the conspiracy. Mere proof of the existence of a conspiracy will not sustain a Section 2 charge. See e.g., Klor's, Inc. v. Broadway Hale Stores Inc., 359 U.S. 207 (1959); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Griffith, 334 U.S. 100 (1948). Were it to be argued that the change in defendants' policy in July 1971 relating to granting wholesale incentive allowances was such an overt act, the demonstrated sound business reasons for making this change would effectively rebut any

contention that it was made in furtherance of a conspiracy to monopolize. It has been only in situations where conduct lacked legitimate business justification that courts have found overt acts sufficient to support a charge of conspiracy to monopolize. See e.g., Klor's, Inc., supra (boycott); Paramount Pictures, Inc., supra (price fixing arrangement); Griffith, supra (exclusive buying arrangement).

Where, as here, changes in policy were motivated by legitimate business aims, courts have been unwilling to regard them as the requisite overt acts. See, Times-Picayune Publishing Co. v. United States, supra. Plaintiff's failure to demonstrate overt conduct in furtherance of any conspiracy bars plaintiff from claiming a conspiracy to monopolize.

VI. WERE THE COURT TO CONSIDER PLAINTIFF'S CLAIMS FOR DAMAGES, THEY WOULD HAVE TO BE LIMITED TO PROVEN LOST WHOLESALE INCENTIVE ALLOWANCES.

Were liability to be found, defendants submit that the only damages which could be recovered by plaintiff would be the precise amount of any additional wholesale incentive allowance which would have been payable to a franchised dealer selling parts to FLM after November 1, 1972 had FLM been an "eligible customer" during that period. Plaintiff's other claims for damages have no causal connection to defendants' conduct, seek dual recovery for the same alleged injury or are purely speculative.

A. Plaintiff's Claim for the Unpaid Wholesale Incentive Allowance on Actual Sales to it Would Have to be Calculated Precisely.

There can be no allegation in this case that defendants have by their conduct made it impossible, or even difficult, for plaintiff to compute precisely what the economic consequences would have been had it been treated as an "eligible customer" after November 1, 1972. It would be a simple ministerial task to determine the exact amount of the wholesale incentive allowance which would have been received by the franchised dealers selling parts to FLM after November 1, 1972 by

comparing FLM's purchase invoices to defendants' Parts and Accessories Price Lists (D. Ex. H) for the appropriate periods. (Tr. 385-386) In fact, this task would have had to be performed in order to claim the wholesale incentive allowance had FLM been an eligible customer (DX. L-1, AU, AV, AW, AX). Plaintiff therefore should be required to calculate the exact amount of the wholesale incentive allowance payable on its purchases from franchised dealers.*

The circumstances here are somewhat unusual. In antitrust actions damages are only rarely capable of precise computation, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). However, the fact that precise calculation is not possible, does not relieve a plaintiff of all responsibility to realistically assess the amount of its damage. Both Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) and Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, (1931), cases relied upon by plaintiff (Pl. Post-Tr. Br. 70), unequivocally state that even in cases where defendant's conduct has prevented precise measurement of damages (which is not the case here), damages may not be based on speculation or guesswork, Bigelow, supra, at 264; Story, supra, at 562. Accord, Keogh v. Chicago &

* Were it to be suggested that such calculation would entail a significant expense, it would follow that such cost of preparing incentive claims would have to be deducted from the total of claimed lost wholesale incentive allowances.

N.W. Ry. Co., 260 U.S. 156, 164-165 (1922); Herman Schwabe, Inc., v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir.), cert. denied, 369 U.S. 865 (1962); Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951); American Sea Green Slate Co. v. O'Halloran, 229 Fed. 77 (2d Cir. 1915); Central Coal & Coke Co. v. Hartman, 111 Fed. 96 (8th Cir. 1901).

Plaintiff's computation of the damages it seeks under Item 1(a) of PX. 106 for the period November 1, 1972 to September 20, 1974 has ranged from $157,542 (Enclosure to 10/11/74 letter) to $220,041 (PX. Id. 106A) under the various methods plaintiff's accountant and attorney, David L. Wasser, has used. His estimates have not taken into account the fact that the percentage of parts sold by defendants which have borne a wholesale incentive has changed significantly from year to year, despite the fact that he conceded that a change in this percentage would change his computation. (Tr. 385) His original estimate, based on historical data before November 1, 1972, was that the amount of the wholesale incentive allowance payable on sales to FLM when it was treated as an eligible customer was 16% of the total amount of FLM's purchases. (Tr. 302) At that time the wholesale incentive allowance on eligible parts was 25%.(Tr. 573; PX. 106, Item 1(a)). Mr. Wasser confirmed in his testimony that his 16% estimate was merely another way of saying that in

terms of dollar volume 64% of the parts FLM purchased prior to November 1, 1972 were eligible parts. (Tr. 440)* In 1971 defendants' sales of eligible crash parts was 63.3%, in dollar volume, of its total sales of crash parts. (Tr. 504)

In 1974, however, the corresponding figure for defendants' sales of eligible parts was only 48%. (Tr. 504) This corresponds almost exactly to another estimate by plaintiff's attorney and accountant which showed that in August 1971 the unpaid

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* i.e. The wholesale incentive allowance (W) payable on a sale of $100 of crash parts to an eligible customer will depend on two factors: (1) the rate of the wholesale incentive allowance on eligible crash parts (25%) and (2) the mix of eligible and ineligible crash parts in the sale. The following formula is applicable:

$$W = (.25)(E)$$

where E is the dollar amount of eligible parts in the sale.

Thus if all the crash parts in a $100 sale are eligible,

$$W_1 = (.25)(\$100) = \$25$$

and if none of the crash parts in a $100 sale are eligible,

$$W_2 = (.25)(\$0) = \$0.$$

Mr. Wasser's calculation that for FLM in the period prior to November 1, 1972 W equalled $16 can be expressed as follows:

$$W_3 = (.25)(\$64) = \$16$$

and therefore of every $100 of crash parts purchased by FLM, $64 (or 64% in dollar volume) were eligible crash parts.

wholesale incentive allowance on all of FLM's purchases was only 12.4% (Enclosure to 10/11/74 letter).* This correlation between the mix of eligible parts in defendants' total sales and plaintiff's purchases follows naturally from the fact that plaintiff makes no effort to specialize in eligible parts, but rather purchases whatever parts are required to repair Ford, Lincoln and Mercury automobiles. (Tr. 701)

In light of the large discrepancies between plaintiff's estimates under the methods Mr. Wasser has used, which vary by almost 40%, and the fact that a precise calculation can be made of this claim for damages, plaintiff should be required as a precondition to any recovery to complete in effect the appropriate claim forms for wholesale incentive for the period in question on behalf of the franchised dealers from whom it purchased.

B. The Stock Order Discount, Parts Obsolescence Protection Program and Dealers' Margins of Profit could not be Recovered from Defendants Since No Causal Connection Between These Items and Defendants' Conduct Can Be Shown.

Plaintiff has shown no causal connection between any conduct of defendants and the recovery sought for the difference between the terms on which it dealt with Central and Atlas prior to November 1, 1972 and the terms on which

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* $W_4 = (.25)(\$48) = \$12.$

it subsequently dealt with Thomas, Parkview and Pleasantville (PX. 106, Items 1(b), (c) and (d)). It is elementary that in order to recover under Section 4 of the Clayton Act a causal connection between conduct prohibited by the antitrust laws and the damages sought to be recovered must be shown. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 560 (1931); Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 957-958 (10th Cir. 1959); Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 736-738 (9th Cir. 1959); Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 633 (2d Cir.), cert. denied, 344 U.S. 875 (1952); Momand v. Universal Film Exchanges, Inc., 72 F. Supp. 469, 482 (D. Mass. 1947), aff'd, 172 F.2d 37 (1st Cir. 1948), cert. denied, 336 U.S. 967 (1949). Yet the record is barren of any showing that any action of defendants had any causal connection whatsoever with these alleged damages.

Plaintiff's relations with Ford and Lincoln-Mercury franchised dealers have always been a matter for negotiation between plaintiff and the individual dealers. There has been no allegation or proof that defendants played any part in setting the terms of FLM's original contract with Central (DX. 0), the subsequent oral modifications of those terms (Tr. 251-252) or the continuation of FLM's business on the same terms with

Atlas (Tr. 252-253). FLM's arrangements with Thomas (Tr. 177, 266-267), Parkview (Tr. 268) and Pleasantville (Tr. 178, 273-275, 277-279) were not influenced in any way by defendants. Mr. McKee's own testimony, cited above, reveals that these franchised dealers negotiated individually with FLM and there is no basis in the record to hold defendants liable for any of the terms negotiated at arms length between FLM and its suppliers.

Parkview decided not to split the benefits of the POPP credit with FLM (PX. 106, Item 1(b)); Central (Tr. 142-143, 146), Thomas (Tr. 177) and Pleasantville (Tr. 274) did so agree, but there has not been one scintilla of evidence that defendants played a part in any of those decisions. The very fact that different franchised dealers chose to deal with FLM on different terms with respect to the POPP credit negates any inference that there was any combination or conspiracy between defendants and their franchised dealers.

By the same token, the decisions by Thomas, Parkview and Pleasantville to seek margins of 5% on their sales to FLM rather than the 2% and later 3% margins previously acceptable at different times to Central and Atlas was not caused by any act of defendants. Atlas' decision to stop selling parts to FLM was not occasioned by any direction from defendants (Tr. 64-65, 671). Plaintiff has offered no evidence that any act

of defendants was causally connected to the fact that the dealers with whom it dealt after November 1, 1972 insisted upon a margin of 5% rather than 2% or 3% (PX. 106, Item 1(d)).

Similarly, the recovery sought for "Stock Order Discounts Denied" (PX. 106, Item 1(c)) cannot be ascribed to any conduct of defendants. Despite the fact that only one stock order "pad" is issued for each dealer's Parts and Accessories Code (Tr. 329), orders need not be submitted on this form to qualify for the stock order discount. (Tr. 711) As long as a dealer's order for his Parts and Accessories Code is submitted on the day of the week allotted to him, that particular order is eligible for the stock order discount (Tr. 711-712). Mr. McKee himself testified that defendants did not place any obstacles in the path of FLM's consolidating its orders with those of a franchised dealer on the dealer's weekly stock order (Tr. 331-332). Once again, this was a matter for negotiation between FLM and its suppliers (Tr. 330-334) and defendants are not chargeable with any liability for FLM's failure to make such arrangements with its suppliers.

C. Plaintiff Could Not Recover Damages Based upon Defendants' Refusal to Deal Directly With It.

Plaintiff has made no showing that defendants' refusal to deal directly with it was anything more than a unilateral, unconditional act of the sort expressly sanctioned

by Section 2(a) of the Robinson-Patman Act and United States v. Colgate & Co., 250 U.S. 300 (1919) and its progeny (See pp. 48-52 supra.). Thus, plaintiff may not recover the damages sought by Item 3 of PX. 106 which represent the 2% to 5% margin charged by the dealers from which FLM purchased parts for the period encompassed by the statute of limitations.

D. Plaintiff's Claim for Loss of "Goodwill" Would Duplicate the Other Recovery Sought, is Grossly Excessive and a Matter of Speculation Not Substantiated by the Record.

Plaintiff seeks $871,150--75% of the total damages sought--for the purported value of its "goodwill" as of September 30, 1972 which, it alleges, has been destroyed since that time by defendants' refusal to treat it as an eligible customer of franchised dealers for which wholesale incentive may be claimed (Tr. 338-343, PX. 106, Item 1(e)). However, this alleged loss improperly duplicates the recovery sought by plaintiff for loss of any pass-through to it of wholesale incentive and does not take into account the effect which any award by the Court of such relief would have (Tr. 349-350).

Moreover, the amount sought by plaintiff is grossly excessive, even under the method purportedly used by plaintiff's attorney-accountant. In addition, the alleged loss of "goodwill" is an entirely speculative alternative to the precise measure of any damages for lost incentive allowance on actual sales which

is capable of being precisely established. (See Item 1(a) of PX. 106.)

1. Duplication. The current market value of a business (which includes both net assets and goodwill) is the present value of the estimated future earnings of the business. Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 393 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963); Standard Oil Co. v. Moore, 251 F.2d 188, 219 (9th Cir. 1957), cert. denied, 356 U.S. 975 (1958); Note, Private Treble Damage Antitrust Suits: Measure for Damages for Destruction of All or Part of a Business, 80 Harv. L. Rev. 1566, 1580 (1967). Plaintiff's own estimate of its "goodwill" is based on an earnings calculation. (Tr. 341, PX. 106 Item 1(e)) It is obvious, however, that since future earnings are a component of the present market value of an enterprise that a plaintiff may not recover both for present market value and for future earnings. "Clearly, going concern value and lost profits are each viable alternative measures of antitrust damages." Lehrman v. Gulf Oil Corp., 500 F.2d 659, 663-664 (5th Cir. 1974) (emphasis added). While recovery for the loss of "goodwill" might be appropriate if plaintiff had gone out of business, it is not an appropriate measure of damages when, as here, plaintiff is still in business (DX. CI).

As the Court said in Volasco Products, supra:

> Another item of damage allowed by the [trial] court was the loss of value to the business. The defendant claims that this was a duplication of damages. In calculating these damages, the plaintiff shows by exhibit 194 that the actual investment in its property, as of April 18, 1958, was $188,741.13 and that its liquidating value, on the theory that it could not be operated as a felt manufacturing plant, was $148,840.00, a loss of $39,901.13. The plaintiff did not liquidate its business and when it received a verdict for lost profits and an injunction to prevent further illegal pricing, it was made whole and suffered no loss to its investment in its property. In Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L.Ed. 544, the plaintiff was forced out of business. Both elements of damages were allowed in Atlas Building Products Co. v. Diamond Block and Gravel Co., 10 Cir., 269 F.2d 950, 958, cert. denied, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed 1727, but there is no indication that they overlapped as they do here." 308 F.2d at 393 (emphasis added).

Accord, Timberlake, Federal Treble Damage Antitrust Actions, § 21.17, n. 18 (1965 ed.); Note, 80 Harv. L. Rev. 1566, supra, at 1580-1581; see also Standard Oil Co., supra, at 219. Plaintiff's attorney-accountant conceded that the claim for loss of goodwill in this action did not take into account the effect of an order of the Court. (Tr. 350) Since Plaintiff has not been driven out of business and may be made whole by an award of lost profits, it is clear that plaintiff may not rely on goodwill as an element of recovery here.

2. Excessive valuation of goodwill. Assuming arguendo that goodwill were a proper measure of damages, plaintiff's estimate thereof is clearly excessive. Defendants' expert

witness, Alfred T. Hansen, an expert in the appraisal of small, closely held companies (Tr. 910), testified that the total value of FLM's business, including goodwill, was $84,400 on September 30, 1972, the end of FLM's fiscal year closest to November 1, 1972, the date on which it ceased being treated as an eligible wholesale customer. (Tr. 937) That this value is less than the net assets of FLM on that date ($92,213) is not surprising in light of the relatively low initial investment required to enter into this sort of enterprise (Tr. 933-934; DX. BS), and the fact that FLM's success is attributable to the expertise and efforts of its two officers (Tr. 109, 121-124, 190-192) rather than to the company itself (Tr. 935-936). The reasons for Mr. Hansen's conclusions are succinctly set forth in his testimony (Tr. 922-927, 930-937) and in DX. BS-BZ and will not be repeated here.

Plaintiff's "expert witness" was its accountant and attorney of record, David L. Wasser. In addition to its other infirmities, the testimony which Mr. Wasser gave and the exhibits he prepared are of questionable efficacy in the light of relevant provisions of the Code of Professional Responsibility, specifically Ethical Considerations 5-9 and 5-10 and Disciplinary Rules 5-101 and 5-102 governing the proper course to be taken when an attorney may be called as a witness. We note

that Mr. Wasser has not withdrawn from the representation of his client (Tr. 471), despite the fact that his client was adequately represented by other attorneys at the trial and presumably would have suffered no hardship had he withdrawn as its attorney and appeared solely as a witness. We further note that another method of avoiding having an attorney place himself in what Ethical Consideration 5-9 refers to as an "unseemly and ineffective position" in which such evidence may be called into question was available by having another expert witness testify on such matters. Such a witness, a person who had participated in the examination of FLM's financial statements for fiscal 1973 which were submitted to the Court in connection with plaintiff's motion for a preliminary injunction, was listed a few days before trial began as a witness to be called by plaintiff and therefore presumably was available to testify on plaintiff's behalf. Under these circumstances, we submit that Mr. Wasser's testimony on his client's behalf must be regarded as without probative force and no more than the arguments of counsel.

Moreover, Mr. Wasser's testimony suffered from serious substantive infinities. Various calculations were patently incorrect. His primary authority for the method he used to calculate FLM's goodwill on September 30, 1972 was Harris,

New York Estates Practice Guide (3d Ed. 1968). It mentions three methods of evaluating closely held stock for estate tax purposes:

> "There are three accepted methods for the evaluation of good will, namely, capitalization of earnings, the federal income tax method, and the year's purchase method."
>
> "Under the capitalization of earnings method the net profits for a representative number of years are averaged and the result multiplied by 10 or 15, depending upon the business. The product is the value of the business including good will."
>
> "The second method* adopted under the early income tax statute is to deduct from the average net profits a percentage of the net tangibles and capitalize the result by multiplying by a fixed number. Adding the product to the net tangibles furnishes the total value."
>
> "The year's purchase method is to take 6 or 8 percent of the average capital invested over a representative number of years and deduct it from the average net profits for the same period of time. The result is multiplied by a fixed number and added to the net worth as good will."
>
> "It is important to remember that the above are methods of valuing good will. The fact is that there is no rule for such valuation."
>
> "The two elements which present the greatest problem are what is a representative number of years and the fixed number to be used. There is no definitive answer, it depending as has been said on the nature of the business, the risk involved, and the stability or regularity of earnings. The usual practice is to furnish balance sheets for the 5

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* Internal Revenue Service, ARM 34, 2 CB 31, June 1920.

> years preceding the [date of valuation]. If these years are not representative of earnings, as by being abnormally high, there should be no hesitation in submitting balance sheets and profit and loss statements for any greater period which it is claimed truly represents normal earnings." 2 Harris, supra, § 561 at 333-334 (footnotes omitted and emphasis in original).

While Mr. Wasser expressly stated that he used the second method described in Mr. Harris' treatise (Tr. 420), he applied it incorrectly. First, Mr. Harris speaks throughout of using "net profits" as the basis of a goodwill computation for the valuation of stock in a "closed corporation", 2 Harris, supra, §§ 561, 624. Yet Mr. Wasser asserted that because FLM is a "small closed corporation" one should instead use pre-tax profits (Tr. 429; PX. 106, Item 1(e)) even though he conceded that he knew Mr. Harris' methods were based on after-tax earnings (Tr. 427).

Second, Mr. Wasser added to FLM's profits $104,000 for the salaries and benefits paid its two officers in fiscal 1972, ended September 30, 1972 (Tr. 428-429; PX. 106, Item 1(e)) despite the fact that nowhere in Mr. Harris' treatise is this procedure suggested. Mr. Wasser stated that he added these salaries and benefits because they would be "available" to an investor in FLM (Tr. 428-429). Presumably, however, an investor who purchased FLM would have to retain as employees Messrs. McKee and Andidero, with their special skill and experience, or employ others of comparable skill and experience (Tr.

109, 121-124, 190-192), and pay them approximately what Mr. McKee and Mr. Andidero presently earn, or else bring his own experience and labor into the business (Tr. 935). In the latter case, the portion of the income a new owner would realize from FLM's operations attributable to his own skill and labor would not be attributable to any intangible asset such as goodwill purchased from FLM but to his own efforts. It has been held not permissible to add such salaries to the net profits in evaluating goodwill in antitrust actions. Simpson v. Union Oil Co., 411 F.2d 897, 909-910 (9th Cir. 1969). As the Court stated in Standard Oil Co. v. Moore, supra:

> "In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See Kimball Laundry Co. v. United States, 338 U.S. 1, 16-17, 69 S.Ct. 1434, 93 L.Ed 1965. These are the factors which would influence a prospective purchaser. The special value which the business might have to [the owner], or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on market value of the business." 251 F.2d at 219-220 (footnote omitted).

Third, Mr. Harris' treatise speaks throughout of using the "average" net profits for "a representative number

of years" and recommends the use of at least five years' earnings for the period prior to the date of valuation. This Mr. Wasser did not do (Tr. 424). He claimed, rather, to have used the median (third) year, fiscal 1972, of the last five years rather than the five years prior to the date of valuation as Mr. Harris recommends, 2 Harris, supra, at 534. Mr. Wasser supplied no basis for this use of one particular year other than "In my opinion, it is a correct approach." (Tr 424).

Finally, the basis for Mr. Harris' second method, as indicated in the passage of Internal Revenue Service ruling A.R.M. 34, 2C.B. 31 (1920) referred to above, was explicitly superseded in 1968 by Revenue Ruling 68-609, 68-2 C.B. 327. This Mr. Wasser knew, or should have known, since this ruling is mentioned in the 1973-74 Supplement to volume 2 of Mr. Harris' treatise under § 561, the section in which the three formulae are to be found, and appears in the notation on the first page of DX. CE, which is Mr. Wasser's list of authorities. This ruling provides, in pertinent part:

> "A percentage return on the average annual value of the tangible assets used in a business is determined, using a period of years (preferably not less than five) immediately prior to the valuation date. The amount of the percentage return on tangible assets, thus determined, is deducted from the average earnings of the business for such period and the remainder, if any, is considered to be the amount of the average annual earnings from the intangible assets of the business for the period. This amount (considered as

> the average annual earnings from intangibles), capitalized at a percentage of, say 15 to 20 percent, is the value of the intangible assets of the business determined under the 'formula' approach.
>
> "The percentage of return on the average annual value of the tangible assets used should be the percentage prevailing in the industry involved at the date of valuation, or (when the industry percentage is not available) a percentage of 8 to 10 percent may be used.
>
> "The 8 percent rate of return and the 15 percent rate of capitalization are applied to tangibles and intangibles, respectively, of businesses with a small risk factor and stable and regular earnings; the 10 percent rate of return and 20 percent rate of capitalization are applied to businesses in which the hazards of business are relatively high.
>
> "The 'formula' approach should not be used if there is better evidence available from which the value of intangibles can be determined." 68-2 C.B. at 328 (emphasis added).

Applying these principles suggested by the Internal Revenue Service to the average "capital" and after-tax earnings for the five fiscal years preceding September 30, 1972 (DX. BV through BZ) yields an average capital of $47,446 and an average after tax profit of $17,626 per year. Since FLM obviously is a business with a high risk factor and unstable and irregular earnings, using the alternative rate of return of 10% and capitalization percentage of 20% (multiplying by 5) is appropriate and yields a goodwill value of $64,405. This figure is, of course, of a totally different magnitude from

Mr. Wasser's extraordinary estimate of $871,150.*

The absurdity of Mr. Wasser's estimate is further demonstrated by the fact that the total price an investor would have been willing to pay for FLM, according to Mr. Wasser, on September 30, 1972, was the sum of its net assets ($92,213) and its goodwill ($871,150) or $963,363. Since FLM's net profit after taxes in fiscal 1972, the last fiscal year before the wholesale incentive allowance policy change affected FLM, was $21,091, Mr. Wasser's hypothetical purchaser would have received a return of 2.2% on his investment at a time when U.S. government bonds were paying 5.6%, corporate industrial bonds 7.4%, utility bonds 8%, equity investments in all U.S. corporations 10.6% and in corporations in the motor vehicle and equipment field, 14.5% (Tr. 936).

3. Speculative nature of goodwill. As noted above (pp. 101-2 supra), the loss of goodwill may provide an acceptable alternative measure of damages to the calculation of lost profits only if a plaintiff has actually been driven out of business. This is the rule because at that

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* Even if the lower rates of return and capitalization are used, goodwill is only $92,246, based upon an 8% rate of return for capital ($47,446 x .08 = $3,796) which is deducted from an average after tax profit of $17,626 to reach goodwill earnings of $13,380, which should be multiplied by 6 2/3 to "capitalize" them at 15% (Tr. 438-9) for a goodwill value of $92,246.

point lost profits are as speculative as goodwill. When more reliable evidence of lost profits on actual sales is available, as it is in this case, the speculative nature of a valuation of goodwill precludes its use. Zenith Radio Corp., supra, at 123; Theatre Inv. Co. v. RKO Radio Pictures, Inc., 72 F. Supp. 650, 656 (W.D. Wash. 1947); Timberlake, supra, § 21.14.

In short, the myriad defects in plaintiff's claim for the loss of its goodwill make it wholly unsuited and without creditable substantiation for use as a measure of damages in this action.

E. Plaintiff's Claim for "Growth Increase Lost" Is Pure Speculation and May Not Be Recovered.

Plaintiff's calculation of "growth increase lost" is a wild guess. The calculation of this element of purported damages (PX. Id. 107 Item 5) assumes that FLM's net profits before officers' salaries and benefits and corporate income taxes would have grown at a stable rate of 25.2% per year in fiscal 1973 and 1974. No such assumption is warranted by anything in the record. The 25.2% estimate is supposedly based on the average of the increases in net profits before officer's salaries and benefits and corporate income taxes for fiscal 1970, 1971 and 1972. But the increases in those years fluctuated wildly from 39.7% in fiscal 1970 to 15.8% in fiscal 1971 to

20.1% in fiscal 1972 (Tr. 394; PX. Id. 107 Item 5). In earlier years the annual increase in this item ranged from 12.5% in fiscal 1968 to 202.5% in fiscal 1969 (PX. Id. 107 Item 5) in the space of a single year. Given such wide gyrations from year to year, it is impossible to estimate with any accuracy what the increase, if any, in fiscal 1973 and 1974 would have been.

Plaintiff's estimate is, in fact, belied by actual experience in fiscal 1973. In that year FLM's gross sales showed a healthy increase of 8.4% over the preceding year (DX. CB) which compares favorably with increases in gross sales of 12.6% in fiscal 1972 and 5.4% in fiscal 1971. Had FLM continued to purchase parts from Atlas in fiscal 1973 on the same terms as it had purchased from Central since fiscal 1969, its gross profit margin would have been approximately 30% (DX. BW-BZ or $239,684 on actual sales of $798,947 (DX. CB). During fiscal 1973 FLM incurred general expenses of $114,736 which, subtracted from $239,684, yields a net profit before officers' salaries and benefits and corporate income taxes of $124,948. This sum represents a <u>decrease</u> of 20.3% from the same item for fiscal 1972 ($156,803) rather than the <u>increase</u> of 25.2% estimated by Mr. Wasser (PX. Id. 107 Item 5). Since FLM's profits would not have increased in 1973 even if business had continued on the pre-November 1972 basis, the purely speculative character of this item is further demonstrated.

Mr. Wasser's estimate for fiscal 1974 takes as its starting point the hypothetical figure derived from his guess for fiscal 1973 and applies to it for the succeeding year a comparably questionable "projection", piling speculation upon speculation. The arithmetic in Item 5 of PX. Id. 107 appears to be correct but the underlying formulae are far too speculative to make the results of these calculations anything more than unsupported guesswork, and for this reason alone should be disregarded.

Plaintiff's growth cannot, of course, be expected to increase without limit, particularly when the number of its customers has remained constant since at least October 1, 1971, long before the occurrence of the acts of defendants of which plaintiff complains. (Tr. 705) Moreover, with the inherently limiting factor of how much Mr. McKee and Mr. Andidero can personally do, plaintiff has intentionally confined its own sales area to Bronx and lower Westchester Counties. (Tr. 705) Thus its failure to grow in fiscal 1974 (Tr. 398) may be attributable to the fact that it has all the business it could possibly handle in the market in which it has chosen to operate. The decline in FLM's sales presumably is due at least in part to a reduction in the number and severity of automobile crashes in fiscal 1974 (Tr. 462, 610-611), as well as economic factors (Tr. 485, 698) which have reduced total sales

of Ford crash parts across the country. (Tr. 462, 610).

In Power Replacements Corp. v. Air Preheater Co., Inc., 356 F. Supp. 872 (E.D. Pa. 1973), plaintiff was permitted to recover the profits it would have made on 29 specific sales it demonstrated it had lost because of defendants' antitrust violations. 356 F. Supp. at 894-895. Plaintiff also sought to recover the profits it would have made had it achieved the "market share" which one of the defendant's employees had predicted it would reach in a period of time prior to trial. 356 F. Supp. 878, 881-882. The Court, however, held that this latter element of the claimed damages was too speculative and, citing Bigelow, supra, and Zenith, supra, held that plaintiff could recover only its lost profits on actual sales and not the speculative estimates of future sales. 356 F. Supp. at 894-895, 899. The same analysis applies with equal force here and this element of recovery should also be disregarded.

In sum, if liability were to be found, plaintiff could properly recover only the exact amount of the wholesale incentive allowance payable on franchised dealers' sales to it since November 1, 1972, and any damages should be limited to such amount as plaintiff documents by precise calculation based on actual sales.

VII. WERE THE COURT TO CONSIDER PLAINTIFF'S REQUESTED INJUNCTIVE RELIEF, IT WOULD HAVE TO BE DENIED AS IMPROPERLY BROAD AND INAPPROPRIATE.

An examination of plaintiff's suggestions for injunctive relief confirms the flawed and circuitous logic on which its entire case is based. If defendants' pricing system is illegal, plaintiff cannot seek its benefits. American Football League v. National Football League, 205 F. Supp. 60, 80 (D. Md. 1962), aff'd, 323 F.2d 124 (4th Cir. 1963); Ring v. Author's League of America, Inc., 186 F.2d 637 (2d Cir. 1951). On the other hand, if defendants' wholesale incentive allowance is legal and proper under the antitrust laws, defendants have a right to see that the incentive is fulfilling its purpose -- encouraging direct sales from dealers to retailers making independent body shops competitive with the body shops of franchised dealers. This purpose is subverted if defendants provide an equal incentive not to sell to retailers. But this would be the result in the instant case if defendants were required to pay the allowance for sales to plaintiff.

Plaintiff identified in its Proposed Conclusions of Law dated September 25, 1974, three kinds of injunctive relief which it would seek, no one of which would be proper.

A. There Should Be No Injunction As to Direct Sales.

It is contended that "The plaintiff is entitled to . . . an order directing the defendants to sell crash parts directly to the plaintiff." (Pl. Post-Tr. Br. 82) Defendants' right to decide not to sell parts directly to plaintiff has been discussed at pp. 48-52, supra. Since there has been no showing in the record that defendants' decision not to sell to plaintiff is anything other than the unilateral, unconditional refusal to deal sanctioned by Section 2(a) of the Robinson-Patman Act and United States v. Colgate & Co., supra, the extraordinary measure of compelling defendants, contrary to their long-standing policy, to sell directly to one not a franchised dealer such as plaintiff is totally unwarranted.

B. There Should Be No Injunction As to Defendants' Communications with Franchised Dealers.

Plaintiff also seeks "an order enjoining the defendants from directing or encouraging its [sic] franchised dealers to refrain from dealing with the plaintiff and from granting the plaintiff any discounts which the franchise [sic] dealer may wish." Plaintiff's Proposed Conclusions of Law, September 25, 1974 ¶ 15. This request, we submit, may be disposed of with equal dispatch. The only evidence on the point in the record

shows that defendants' franchised dealers have always been free to retain or pass along, as they see fit, the benefits of any of defendants' "discounts" without any control of this decision by defendants and that the receipt of these "discounts" is not contingent upon what the franchised dealers do with them. (Tr. 64-65, 520; DX. G, H). In fact, if defendants had attempted to control their dealers' disposition of the discounts, defendants would have been violating Section 1 of the Sherman Act. Nor is there anything in the record to support the granting of any injunctive relief regarding defendants' dealings with franchised dealers.

This being the case, a curious aspect of plaintiff's final request for injunctive relief comes to light:

C. There Should Be No Injunction to Regulate Contracts Between Franchised Dealers and Plaintiff.

Plaintiff also seeks "an injunction enjoining the defendants themselves and/or by instruction to their franchise [sic] dealers from refusing to sell crash parts to the plaintiff so that the plaintiff shall have the benefit of the wholesale incentive allowance, the stock order discount, the obsolescence credit, the surplus inventory reduction and any other wholesale benefits which are available to other persons acting as wholesalers for Ford crash part." Plaintiff's Proposed Conclusions of Law, September 25, 1974 ¶ 14. Even if

defendants were forced by an order of this Court to treat plaintiff as an eligible customer when one of their franchised dealers sold to plaintiff, there is no assurance that franchised dealers dealing with plaintiff would pass the "benefit" of the wholesale incentive allowance on to plaintiff. Franchised dealers are already entitled to the benefits of the stock order discount, Parts Obsolescence Protection Program and Surplus Inventory Reduction Program* on their purchases and parts from FMC for sale to FLM. Some of the franchised dealers with whom FLM has negotiated for supplies have purportedly passed these benefits along to plaintiff; others have not (see pp. 97-8, supra , but all have acted without any "instruction" by defendants.

The most defendants could do, without violating Sherman Act, Section 1 would be to make the incentive available to franchised dealers on sales to FLM. Plaintiff could not be heard to complain if it were declared an eligible customer by order of this Court and the franchised dealers from whom it purchased parts (who are not parties to this action) retained all or part of the wholesale incentive allowance received from defendants. Plaintiff would receive all the

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* Mr. McKee, in fact, testified that FLM does not even want the benefits of the Surplus Inventory Reduction Program (Tr. 146).

protection to which it could be entitled under the terms of Fed. R. Civ. P. 65(d), which limits any injunction to defendants, "their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them ...." (emphasis added). Since no franchised dealer has been named as a party to this action, any Order can only go so far as to prevent defendants from influencing their franchised dealers' disposition of any "benefits" received.

Were the Court to find for plaintiff the matter of any injunctive relief would have to be most carefully examined if the Court were to avoid a continuing role of market regulator. We would anticipate that the only injunctive relief which could possibly be considered as appropriate in the circumstances would be one ordering defendants to consider sales of parts by their franchised dealers to FLM "eligible sales" in determining eligibility for the wholesale incentive allowance. Actually, plaintiff's Post-Trial Brief all but abandons any request for injunctive relief limiting its request to one sentence in the conclusion calling for an injunction to compel direct sales to plaintiff and an undefined prohibition against "violation of the antitrust laws" (Pl. Post-Tr. Br. 82).

CONCLUSION

The acts of defendants attacked by FLM in this action do not violate the antitrust laws of the United States and defendants are not liable to FLM. FLM, a voluntary middleman in the distribution system for crash parts, has no vested right to the protection of the particular role which it has sougut to play, and FLM has established no basis in equity for any injunctive relief against either Ford or FMC. Judgment should be entered in favor of defendants, on the merits, dismissing the complaint.

Dated: March 14, 1975
New York, New York

Respectfully submitted,

SULLIVAN & CROMWELL
Attorneys for defendants,
48 Wall Street,
New York, N.Y. 10005.
(212) 952-8100

Robert MacCrate,
William M. Dallas, Jr.,

William A. Zolbert,

Of Counsel.